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United States
Circuit Court of Appeals
For the Ninth Circuit.

CHIN HING,

Appellant,

vs.

HENRY M. WHITE, as Commissioner of Immigration
at the Port of Seattle, Washington, for
the United States Government,

Appellee.

In the Matter of the Application of CHIN HING for
a Writ of Habeas Corpus.

Transcript of Record.

Upon Appeal from the United States District Court for
the Western District of Washington, Northern Division.

Filed

DEC 20 1915

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHIN HING,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States, for the
Western District of Washington, Northern Di-
vision.*

No. 2857.

In the Matter of the Application of CHIN HING
for Writ of Habeas Corpus.

Names and Addresses of Counsel.

J. J. SULLIVAN, Esq., Attorney for Petitioner and
Appellant,

510-511 White Building, Seattle Washing-
ton.

A. M. BEELER, Esq., Attorney for Petitioner and
Appellant.

510-511 White Building, Seattle Washing-
ton.

CLAY ALLEN, Esq., United States Attorney, At-
torney for Respondent and Appellee,

310 Postoffice Building, Seattle, Washing-
ton.

GEORGE P. FISHBURNE, Esq., Assistant United
States Attorney, Attorney for Respondent and
Appellee,

310 Postoffice Building, Seattle, Washing-
ton. [1*]

*Page number appearing at foot of page of original certified Record.

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2857.

**Petition of Ching Hing, Through and by His
Attorney, John J. Sullivan.**

Comes now John J. Sullivan, as attorney for and in behalf of Ching Hing, an alien, a subject of the Emperor of China, and a son of Chin Shew, a merchant of New York City, and respectfully makes this application for a Writ of Habeas Corpus and alleges as follows:

I.

That said Ching Hing is imprisoned and restrained of his liberty by the United States Commissioner of Immigration White and the United States Chinese Inspector Henry Monroe, or by person or persons acting through, by or under them, and that said Ching Hing is imprisoned at the Detention House at the Immigration Station in the City of Seattle, under the charge that the said Ching Hing has no lawful right to be admitted into the United States and that he should be deported according to law, and your Petitioner further informs the Honorable Court that said imprisonment, confinement and restraint and Order of Deportation is illegal and arises from the following facts, to wit: That Ching Hing arrived at the port of Seattle on a voyage from China on the 5th day of August, 1914, and said Ching Hing was denied admittance into the United States on the ground that he was not

legally entitled to be admitted therein; that said Ching Hing was given a hearing by the Immigration officials and upon evidence being presented on August 27th, 1914, an order was issued by the Commissioner of Immigration at Seattle, finding that said Ching Hing was not entitled to admission to the United States and that he should be deported; that an appeal was given by said Ching [2] Hing through his attorneys Stadden & Stewart, of Washington, D. C., to the Secretary of Labor, and that on September 26th, 1914, the said Order of Deportation and said Finding of Commissioner of Immigration of Seattle, Washington, was affirmed and said Ching Hing was ordered deported.

This petitioner is informed and believes and so states the fact to be that said Commissioner of Immigration White, in charge of the district of Washington, and said Chinese Inspector Henry Monroe, or officials or agents acting by, under or through them or for the United States Government, are about to deport and return the said Ching Hing to China, in violation of the treaty relations between the United States and China, and in violation of the laws and statutes of the United States relating to the Chinese Exclusion Act, and in violation of the laws relating to the acts and powers of the Secretary of Labor and the Assistant Secretary of Labor, in that said Ching Hing is being deprived of his liberty without due process of law and without being given a fair hearing by said Commissioner of Immigration White and said Chinese Inspector Henry Monroe, or officials acting by, under or

through them or for the United States Government.

Your petitioner further alleges that the right of appeal from said finding of Commissioner of Immigration White and Chinese Inspector Henry Monroe, or officials acting by, under or through them or for the United States Government in and for the district of Washington, by the statutes in such cases made and provided for in relation to the Chinese Exclusion Laws, has been violated and that his full rights have not been accorded to your petitioner Ching Hing, in this: That W. B. Wilson is the Secretary of Labor and that Louis Post is his only Assistant Secretary of Labor; that both of said officials, as your petitioner alleges upon information and belief and knows to be the fact, were at their respective offices in the capitol at Washington, doing the duties imposed upon them on the day that the said appeal of Ching Hing was considered [3] and that upon said day and at said time that the appeal of the said Ching Hing to the Secretary of Labor, from the decision denying the right of entry to the United States of said Ching Hing, came up for hearing and consideration, that said Secretary of Labor and the Assistant Secretary of Labor were then and there present in their respective offices and that the said secretary of Labor and Assistant Secretary of Labor under the statutes, should have considered and determined the said appeal of said Ching Hing from the said adverse decision of the said Commissioner of Immigration and Chinese Inspector Henry Monroe, but that said Secretary of Labor and Assistant Secretary of Labor failed,

neglected or refused so to do and hence the said Ching Hing has been denied his right of appeal.

Your petitioner further alleges that one J. B. Densmore is the solicitor of the Department of Labor and further alleges that said J. B. Densmore attempted to perform the duties of the Secretary of Labor or Assistant Secretary of Labor while they were present in their respective offices, and the order of the President of the United States, with due respect thereto, does not authorize J. B. Densmore, or such solicitor of the Department of Labor to perform duties of the Secretary of Labor or the Assistant Secretary of Labor, save and except in their absence, and therefore the action of said J. B. Densmore in claiming to be the acting Secretary of Labor during the presence of said officials then and there, is a usurpation of the duties imposed upon the said Secretary of the Department of Labor and the said Assistant Secretary of Labor, by Congress, and the said J. B. Densmore in assuming the duties of the said Secretary of Labor and Assistant Secretary of Labor and affirming the Finding of the Commissioner of Immigration at Seattle, Washington, and the Chinese Inspector, Henry Monroe, in relation to the case of Ching Hing, exceeded the statute, and his action in sustaining the adverse decision in relation to the right of entry of Ching Hing into the United States is null and [4] *and* the said Ching Hing has been denied the right of appeal as provided by the statutes in such cases.

Dated this 29th day of September, 1914.

JOHN J. SULLIVAN,

Atty. for Ching Hing.

State of Washington,

County of King.—ss.

John J. Sullivan, attorney for the petitioner named in the foregoing petition, being first duly sworn, on oath deposes and says: That he has read the said petition, knows the contents thereof, and that the same is true of his own knowledge and that he believes said facts to be true.

JOHN J. SULLIVAN.

Subscribed and sworn to before me this 29th day of September, 1914.

ADAM BEELER,

Notary Public in and for the State of Washington,
Residing at Seattle.

[Indorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Sep. 29, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [5]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2857.

In the Matter of the Application of CHING HING,
for Writ of Habeas Corpus.

Writ of Habeas Corpus.

The President of the United States of America, to United States Commissioner of Immigration White, and to United States Chinese Inspector Henry Monroe, or to such U. S. Government Official Having Charge or Custody of Ching Hing, Petitioner:

We command you that you have the body of Ching Hing, by you imprisoned and detained under order of deportation as it is said, together with the time and cause of such imprisonment and detention and order of deportation by whatsoever name the said Ching Hing shall be named or charged, before Honorable Jeremiah Neterer, Judge of the United States District Court for the Western District of Washington, Northern Division, at the Federal Building in Seattle, State of Washington, on the 1st day of October, 1914, at 2 o'clock P. M. of that date, to do and receive what shall then and there be considered concerning the said Ching Hing, and have you then and there the body of the said Ching Hing and there this writ.

WITNESS The Honorable JEREMIAH NETERER, Judge of the United States District Court, Western District of Washington, Northern Division, at the Federal Building Seattle, Washington, this 29th day of September, 1914. [6]

ATTEST my hand and seal of the United States District Court, the day and year last above written.

[Seal]

FRANK L. CROSBY,

Clerk.

By Ed. M. Lakin,

Deputy Clerk.

Return on Service of Writ.

United States of America,

Western District of Washington,—ss.

I hereby certify and return that I served the annexed Writ of Habeas Corpus on the therein-named United States Commissioner of Immigration Henry White by handing to and leaving a true and correct copy thereof with J. H. Sargent, U. S. Chinese Inspector personally at Seattle, in said District on the 30th day of September, A. D. 1914.

JOHN M. BOYLE,

U. S. Marshal.

J. J. Powers,

Deputy.

Marshal's fees—\$2.18.

[Indorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Sep. 30, 1914. Frank L. Crosby, Clerk. By ———, Deputy. [7]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2857.

In the Matter of Application of CHING HING for
a Writ of Habeas Corpus.

Order to Show Cause.

Above-named petitioner having made application to this Court for Writ of Habeas Corpus by and through John J. Sullivan, counsellor, address of United States Commissioner of Immigration White, and Henry Monroe, United States Chinese Inspector, and to such persons or agents acting by, through or under them or in behalf of the U. S. Government, in whose custody the petitioner is shown by his petition to be confined and restrained of his liberty and to be ordered deported, as alleged in his petition illegally and unwarranted and without power, and not under virtue of or by authority of the statutes of the United States, and the Court being fully advised by John J. Sullivan, counsel for the petitioner, it is ordered that the Honorable U. S. Commissioner of Immigration White, and the Honorable Henry Monroe, Chinese Inspector in and for the District of Washington in charge of the Immigration Station and Detention House at Seattle, Washington, or such persons acting under or through said parties and in behalf of the United States Government having custody of said petitioner Ching Hing, show cause before this Court at the courtroom at the Federal Building, in the City of

Seattle on the 1st day of October, 1914, at two o'clock in the P. M., why said application should not be granted and in the mean time you, [8] the Honorable U. S. Commissioner of Immigration White, and you, the Honorable Henry Monroe, Chinese Inspector in and for the District of Washington in charge of the Immigration and Detention Station at Seattle, Washington, as well as said persons who are acting under and through you, refrain and desist from deporting or placing, and removing said petitioner Ching Hing from said District or carrying into effect any warrant or order for his deportation which may be held by you or either of you.

It is further ordered that a certified copy of this order shall be served upon the Honorable U. S. Commissioner of Immigration White, or upon Honorable U. S. Chinese Commissioner Henry Monroe or such person or persons acting by or through them or in behalf of the United States in connection with the Immigration Station at Seattle, Washington, or any such Government official in charge of said Ching Hing, petitioner, on or before the hour of five (5) o'clock P. M. on this 29th day of September, 1914. Petitioner expressing ability and willingness to deposit sufficient funds to pay for his sustenance until the determination of this application and until the sailing of the next vessel, not exceeding \$100.00.

Done this 29th day of September, 1914.

JEREMIAH NETERER,

Judge.

[Indorsed]: Filed in the U. S. District Court,
Western Dist. of Washington, Northern Division,

Sep. 29, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

Return on Service of Writ.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed Order and Petition on the therein-named United States Commissioner of Immigration Henry White by handing to and leaving a true and correct copy thereof with J. H. Sargent, U. S. Chinese Inspector personally at Seattle, in said District, on [9] the 30th day of September, A. D. 1914.

JOHN M. BOYLE,

U. S. Marshal.

By J. J. Powers,

Deputy.

Marshal's fees—\$2.00.

[Indorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Sep. 30, 1914. Frank L. Crosby, Clerk. By _____, Deputy. [10]

United States District Court for the Western District of Washington.

No. 2857.

UNITED STATES GOVT.,

Plaintiff,

vs.

CHING HING,

Defendant.

Appearance.

To the Clerk of the Above-entitled Court:

You will please enter our appearance as Attys. for Ching Hing in the above-entitled cause and service of all subsequent papers, except writs and process, may be made upon said Beeler & Sullivan, by leaving the same with

BEELER & SULLIVAN,
Office Address 510 White Bldg.,
Seattle, Wash.

[Indorsed]: Appearance. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Sep. 30, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [11]

*United States District Court, Western District of
Washington, Northern Division.*

In the Matter of the Application of CHING HING
for a Writ of Habeas Corpus.

Return to Writ of Habeas Corpus.

To the Honorable Judges of the United States District Court for the Western District of Washington:

That the said Henry M. White, as Commissioner of Immigration at the Port of Seattle, respondent herein, appears by Clay Allen, Esq., United States Attorney for the Western District of Washington, and G. P. Fishburne, Assistant United States Attorney for said District, and in obedience to the Writ of Habeas Corpus heretofore issued in said cause,

produces in court the body of the said Ching Hing, and shows to the Court as follows:

I.

That he denies each and every allegation save and except what is hereinafter specifically admitted.

II.

That he admits from line 12 to 19, inclusive, on page one of the petition, but denies the illegality of the confinement and restraint as set forth from lines 20 to 22, inclusive, on page one; that from line 22 on page one, commencing at the word "that," the last word in said line, to and including the words "Ching Hing to China" in line 8 on page 2, he admits.

III.

That he denies the allegation set forth from line 8 [12] of page two of the petition through to the end of said petition.

IV.

That as affirmative matter he alleges that he, the said Henry M. White, as Commissioner of Immigration aforesaid, holds the said Ching Hing as an alien immigrant under an order of deportation to the Empire of China, of which the said Ching Hing is a native citizen, and from which he came to the United States, arriving at the Port of Seattle on the steamship "Protesilaus" on the 5th day of August, 1914; that the said Ching Hing upon his arrival at said port applied for admission into the United States on the ground of being the minor son of a domiciled merchant of New York City, that thereupon a hearing was had before the respondent as Commissioner of Immigration upon evidence both oral and documentary

duly offered in said matter; that the respondent herein as such Commissioner of Immigration duly considered said evidence so offered and thereupon the application of said Ching Hing for admission into the United States was denied and he was ordered returned to China; that the said Ching Hing thereupon appealed from the said decision of the said Commissioner to the Secretary of the Department of Labor and the said Secretary after due consideration of said appeal affirmed the decision of said Commissioner of Immigration in the manner provided by law; that the record and decision and exhibits both on the hearing before the said Commissioner and on appeal to the Secretary of Labor are hereto attached, marked exhibit "A" and made a part of this return.

Wherefore, respondent asks that the Writ of Habeas Corpus [13] herein be discharged and the petition dismissed.

HENRY M. WHITE,
Commissioner of Immigration.

Assistant United States Attorney.

The United States of America,
Western District of Washington,
Northern Division,—ss.

Henry M. White, being first duly sworn on oath, deposes and says: That he is the Commissioner of Immigration at the Port of Seattle and respondent in the above-entitled action; that he has read the foregoing return to the Writ of Habeas Corpus herein, knows the contents thereof and that the same

is true as he verily believes.

HENRY M. WHITE.

Subscribed and sworn to before me this 16th day of October, 1914.

S. E. LEITCH,
Deputy Clerk, U. S. Dist. Court, Western Dist. of
Washington.

[Indorsed]: Return to Writ of Habeas Corpus.
Filed in the U. S. District Court, Western Dist. of
Washington, Northern Division, Oct. 16, 1914.
Frank L. Crosby, Clerk. By E. M. L., Deputy.
[14]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2857.

In the Matter of the Application of CHING HING
for a Writ of Habeas Corpus.

**Stipulation [Allowing Filing of Further Amended
Petition].**

It is hereby agreed and stipulated by and between John J. Sullivan, attorney for petitioner Ching Hing, and Clay Allen and George B. Fishburne, United States District Attorney and Assistant United States District Attorney for the United States Government, that the petitioner, by and through his attorney John J. Sullivan may file a further amended petition in the above-entitled case.

Dated this 23d day of January, 1915.

CLAY ALLEN,

G. P. FISHBURNE,

Attorneys for United States Government.

JOHN J. SULLIVAN,

Attorney for Petitioner Ching Hing.

[Indorsed]: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 25, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [15]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2857.

In the Matter of the Application of CHING HING
for a Writ of Habeas Corpus.

**Further Amended Petition of Ching Hing, by and
Through His Attorney, John J. Sullivan.**

Comes now John J. Sullivan, as attorney for and in behalf of Ching Hing, an alien, a subject of the Emperor of China, and a son of Chin Shew, merchant of New York City, and respectfully makes this application for a Writ of Habeas Corpus, and alleges as follows:

I.

That said Ching Hing is imprisoned and restrained of his liberty by the United States Commissioner of Immigration White and the United States Chinese Inspector Henry Monroe, or by person or persons acting through, by or under them, and that said

Ching Hing is imprisoned at the Detention House at the Immigration Station in the City of Seattle, under the charge that the said Ching Hing had no lawful right to be admitted into the United States, and that he should be deported according to law, and your petitioner further informs the Honorable Court that said imprisonment, confinement and restraint and Order of Deportation is illegal and arises from the following facts, to wit: That Ching Hing arrived at the Port of Seattle on a voyage from China on the 5th day of August, 1914, and said Ching Hing was denied admittance into the United States on the ground that he was not legally entitled to be admitted therein; that said Ching Hing was given a hearing by the Immigration Officials and upon evidence being presented on August 27, 1914, an order was issued by the Commissioner of Immigration at Seattle, finding that said [16] Ching Hing was not entitled to admission to the United States and that he should be deported; that an appeal was given by said Ching Hing, through his attorneys Stadden & Stewart, of Washington, D. C., to the Secretary of Labor, and that on September 26, 1914, the said Order of Deportation and said finding of Commissioner of Immigration of Seattle, Washington, was affirmed and said Ching Hing ordered deported.

II.

This petitioner is informed and believes and so states the fact to be that said Commissioner of Immigration White, in charge of the District of Washington, and said Chinese Inspector Henry Monroe, or officials or agents acting by, under or through them,

or for the United States Government, are about to deport and return the said Ching Hing to China, in violation of the treaty relations between the United States and China, and in violation of the laws and statutes of the United States relating to the Chinese Exclusion Act, and in violation of the laws relating to the acts and powers of the Secretary of Labor and the Assistant Secretary of Labor, in that said Ching Hing is being deprived of his liberty without due process of law and without being given a fair hearing by said Commissioner of Immigration White and said Chinese Inspector Henry Monroe, or officials acting by, under or through or for the United States Government.

III.

Your petitioner further alleges that the right of appeal from said finding of Commissioner of Immigration White and Chinese Inspector Henry Monroe, or officials acting by, under or through them or for the United States Government in and for the District of Washington, by the statutes in such cases made and provided for in relation to the Chinese Exclusion Laws, has been violated and that his full rights have not been accorded to your petitioner Ching Hing in this: That W. B. Wilson is the Secretary of Labor and that Louis Post is his only Assistant Secretary of Labor; that both of [17] said officials, as your petitioner alleges upon information and belief, and knows to be the fact, were at their respective offices in the capitol at Washington, doing the duties imposed upon them on the day that the said appeal of Ching Hing was considered, and that upon

said day and at said time that the appeal of the said Ching Hing to the Secretary of Labor, from the decision denying the right of entry to the United States of Ching *Hin*, came up for hearing and consideration, that said Secretary of Labor and the Assistant Secretary of Labor were then and there present in their respective offices, and that the said Secretary of Labor or Assistant Secretary of Labor, under the statutes, should have considered and determined the said appeal of Ching Hing from the said adverse decision of the said Commissioner of Immigration and Chinese Inspector Henry Monroe, but that said Secretary of Labor and Assistant Secretary of Labor failed, neglected or refused so to do, and hence the said Ching Hing has been denied his right of appeal.

IV.

Your petitioner further alleges that one J. B. Densmore is the Solicitor of the Department of Labor, and further alleges that said J. B. Densmore attempted to perform the duties of the Secretary of Labor or Assistant Secretary of Labor while they were present in their respective offices, and the order of the President of the United States, with due respect thereto, does not authorize said J. B. Densmore, or such Solicitor of the Department of Labor to perform the duties of the Secretary of Labor or the Assistant Secretary of Labor, save and except in their absence, and therefore the action of said J. B. Densmore in claiming to be acting Secretary of Labor during the presence of said officials then and there, is a usurpation of the duties imposed upon the said Secretary of the Department of Labor and the

said Assistant Secretary of Labor, by Congress, and the said J. B. Densmore, in assuming the duties of the said Secretary of Labor and the Assistant Secretary [18] of Labor and affirming the finding of the Commissioner of Immigration at Seattle, Washington, and the Chinese Inspector, Henry Monroe, in relation to the case of Ching Hing, exceeded the statute, and his action in sustaining the adverse decision in relation to the right of entry of Ching Hing into the United States, is null and the said Ching Hing has been denied the right of appeal as provided by the statutes in such cases.

V.

Your petitioner further states that he had not had a fair and impartial trial before the Inspector in charge of Immigration in Seattle, Washington; that there is no evidence in the records to sustain the Department's Exclusion and Deportation Order; that your petitioner Ching Hing, after the Department had illegally ordered his exclusion from entry to the United States and his deportation therefrom without any authority or law, to wit, by the illegal act of said Solicitor J. B. Densmore, who had no authority to order said deportation, was denied a fair and impartial trial in accordance with law, and that said petitioner was denied the right of having his counsel, Corry M. Stadden, appear before the Commissioner-General of Immigration, or the lawful Acting Secretary of Labor after said Petitioner Ching Hing had appealed from the said illegal act of said solicitor, J. B. Densmore, or after said appeal had reached the Department of Labor, in order

that said counsel might present the case to the said Commissioner-General of Immigration, or the lawful acting Secretary of Labor, and bringing to the attention of said officials the said illegal act of said solicitor J. B. Densmore, and place certain evidence before said officials which would warrant a reversal of said order of exclusion and deportation, or would warrant their consideration of the appeal of your petitioner.

WHEREFORE, Your petitioner prays that this Court find that he has not been accorded the rights and privileges allowed by the [19] Constitution of the United States, and by the treaty between the United States and China, and that he be discharged and allowed to join his father who is a merchant in New York City.

Dated this 22d day of Jan., 1915.

JOHN. J. SULLIVAN,
Attorney for Petitioner Ching Hing.

State of Washington,
County of King,—ss.

John J. Sullivan, being first duly sworn, on oath deposes and says: That he is the attorney for the petitioner Ching Hing; that he has read the foregoing further amended petition, knows the contents thereof, and that the same is true of his own knowledge; that those facts which he does not know of his own knowledge, he alleges upon information and belief to be true.

JOHN J. SULLIVAN.

Subscribed and sworn to before me this 22d day of Jan., 1915.

[Seal] ADAM BEELER,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Indorsed]: Further Amended Petition of Ching Hing. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 25, 1915. Frank L. Crosby, Clerk. By E.M.L., Deputy. [20]

*United States District Court, Western District of
Washington, Northern Division.*

No. 2857.

In the Matter of the Application of CHING HING
for a Writ of Habeas Corpus.

**Return to Amended Petition for Writ of Habeas
Corpus.**

Comes now the respondent and as a return to the amended petition herein, alleges as follows:

I.

That he denies each and every allegation thereof save and except what is hereinafter especially admitted.

II.

That he admits the allegations of paragraph I thereof through line 21.

That he denies the allegations of said paragraph I from line 22 to line 24, both inclusive.

That he admits the allegations of said paragraph I from line 25 on page 1 to and including line 7 on page 2.

III.

That he denies all the other allegations of said petition.

That as affirmative matter he alleges that he, the said Henry M. White, as Commissioner of Immigration aforesaid, holds the said Ching Hing as an alien immigrant under an order of deportation to the Empire of China, of which the said Ching Hing is a native citizen, and from which he came to the United States, arriving at the Port of Seattle on the steamship "Protesilaus" on the 5th day of August, 1914; that the said Ching Hing upon his arrival at said port applied for admission into the United States on the ground [21] of being the minor son of a domiciled merchant of New York City; that thereupon a hearing was had before the respondent as Commissioner of Immigration upon evidence both oral and documentary duly offered in said matter; that the respondent herein as such Commissioner of Immigration duly considered said evidence so offered and thereupon the application of said Ching Hing for admission into the United States was denied and he was ordered returned to China; that the said Ching Hing thereupon appealed from the said decision of the said Commissioner to the Secretary of the Department of Labor and the said Secretary after due consideration of said appeal affirmed the decision of said Commissioner of Immigration in the manner provided by law; that the record and decision and exhibits both on the hearing before the said Commissioner and on appeal to the Secretary of Labor are hereto attached, marked

exhibit "A" and made a part of this return.

HENRY M. WHITE,
Commissioner of Immigration.

Assistant United States Attorney.

The United States of America,
Western District of Washington,
Northern Division.

Henry M. White, being first duly sworn, on oath deposes and says: That he is the Commissioner of Immigration at the Port of Seattle and respondent in the above-entitled action; that he has read the foregoing return to amended petition for Writ of Habeas Corpus herein, knows the contents thereof and that the same is true as he verily believes.

HENRY M. WHITE. [22]

Subscribed and sworn to before me this 26th day of April, 1915.

[Seal] ED M. LAKIN,
Deputy Clerk, U. S. Dist. Court, Western Dist. of
Washington.

[Indorsed]: Return to Amended Petition for Writ of Habeas Corpus. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 26, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [23]

*United States District Court, Western District of
Washington, Northern Division.*

No. 2857.

In the Matter of the Application of CHING HING
for a Writ of Habeas Corpus.

Reply to Return to Writ of Habeas Corpus.

Come now John J. Sullivan, as attorney for petition of Chin Hing, and in reply to the affirmative matter set up in the return to Writ of Habeas Corpus, admits the allegations therein up to and including the word "China" in line 20, and denies each and every allegation thereafter.

Wherefore, petitioner prays that he be discharged.

JOHN J. SULLIVAN,

Atty. for Petitioner.

The United States of America,
Western District of Washington,
Northern Division,—ss.

John J. Sullivan, being first duly sworn on oath, deposes and says: That he is attorney for the petitioner herein; that he has read the foregoing reply to the return to the Writ of *Habeas*, knows the contents thereof, and believes the same to be true.

JOHN J. SULLIVAN.

Subscribed and sworn to before me this 10th day of April, 1915.

[Seal]

ADAM BEELER.

Copy of within Reply and Return to Writ of Habeas Corpus received and due service of same ac-

knowledgeed this 21st day of April, 1915.

WINTER S. MARTIN,
Attorney for Asst. U. S. Atty.

[Indorsed]: Reply to Return to Writ of Habeas Corpus. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 21, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy [24]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 2857.

In the Matter of CHING HING.

**Stipulation [to Take Deposition of Louis F. Post and
Corry M. Stadden].**

It is hereby stipulated by and between Beeler & Sullivan, attorneys for the petitioner, Ching Hing, and George P. Fishburne, Assistant District U. S. Attorney, attorney for the United States Government and for the Commissioner of Immigration White, that a deposition be taken before Thomas G. Lewis, attorney and notary public, Commercial Bank Building, Washington, D. C., and that Louis F. Post, Assistant Secretary of the Department of Labor, and Corry M. Stadden, both of Washington, D. C., then and there give testimony on a subpoena issued out of this court to said parties to answer the interrogatories herein made a part of this stipulation or additional interrogatories of respondent.

Dated at Seattle, Washington, October 20, 1914.

BEELER & SULLIVAN,

G. P. FISHBURNE,

Asst. U. S. Attorney.

[Indorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Oct. 20, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [25]

Plaintiff's Exhibit No. 2 [Opinion of Supreme Court of the District of Columbia].

Feb. 16, 1915.

In the Supreme Court of the District of Columbia.
In the Matter of CHING HING.

OPINION OF THE COURT.

The question raised in this case grows out of a rule issued by this Court, returnable November 14, 1914, directed to Louis F. Post, Assistant Secretary of Labor, requiring him to show cause why he should not answer certain questions propounded to him by one Thomas G. Lewis, under a commission to take the testimony of said Post issued by the Honorable Jeremiah Neterer, Judge of the District Court of the United States for the Western District of Washington. The first and material question which the witness refused to answer was:

“2. Were you on duty at the Department of Labor on each of the following dates: September 24, 1914, September 25, 1914, and September 26, 1914?”

The return shows that the witness refused to answer on the following ground:

“That question relates to the internal administration of the Department, and I regard it as calling for an answer that might be prejudicial to the public interest. For this reason I decline to answer until otherwise instructed by the Secretary of Labor.”

The litigation in the United States Court in Washington from which the commission issued was based on a petition for Habeas Corpus filed by one Ching Hing, who was detained by the Immigration officers of the District of Washington under an order of deportation which had been confirmed on appeal to the Secretary of Labor. His petition further alleges that his appeal was not heard by the Secretary of Labor or by the Assistant Secretary of Labor, who were at [26] their respective offices in Washington, and that thus he has been deprived of his liberty without due process of law. It appears from the brief in behalf of the Commissioner that the order of exclusion or deportation on appeal was signed by one J. B. Densmore as “Acting Secretary of Labor.”

Section 25, of the Immigration Act of February 20, 1907 (34 Stat. pp. 898, 906) provides in part as follows:

“Provided, that in every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of the appropriate Immigration officers, if adverse to the admission of such alien, shall be final unless reversed on appeal to the Secretary of Commerce and Labor.”

Under Rule 5 of the “Regulations Governing Ad-

mission of Chinese" the Chinese applicant if adjudged to be inadmissible, "shall be advised of his right of appeal to the Secretary of Labor," and (c) "the notice of appeal shall act as a stay upon the disposal of the applicant until a final decision is rendered by the Secretary of Labor."

Section 179, R. S. U. S. reads as follows: "In any of the cases mentioned in the two preceding sections the President may, in his discretion, authorize and direct the head of any other department or any other officer in either department, whose appointment is vested in the President, to perform the duties of the vacant office until a successor is appointed, or the sickness or absence of the incumbent shall cease."

Under this section, the following Executive order (No. 1783) was issued by the President:

"Pursuant to the authority contained in Section 179 of the Revised Statutes, I hereby authorize and direct John B. Densmore, Solicitor of the Department of Labor, to perform the duties of Secretary of Labor, during the absence of the Secretary of Labor and [27] the Assistant Secretary of Labor." June 5, 1913.

It will therefore be seen that the question propounded to the witness Post, which he declined to answer, goes to the jurisdiction of the officer who assumed to act as Secretary of Labor in signing the mandate, or order of exclusion, under which Ching Hing is detained.

As stated by Judge Dooling of the United States District Court for the Northern District of California in the case of *In re Tsuie Shee, et al.*, on Oc-

tober 23, 1914: "The appellants were by law entitled to appeal to the Secretary of Labor, and entitled to have their appeal heard and determined by him except as above stated, and the determination of their appeal by another not authorized is neither a fair hearing, nor due process of law."

Briefly stated, the question asked respondent was whether or not he was on duty in the Department on three named days. Upon his answer, to an extent, depends the liberty of Ching Hing. He declines to answer because the answer "might be prejudicial to the public interest." In exactly what manner it might be "prejudicial to the public interest" for any official to testify as to whether he was, at a given time, performing the duties charged upon him by law and for which he was being paid at public expense, when the fact becomes important in a judicial investigation affecting the liberty of an individual—even a Chinaman—is not apparent on this record. In the instant case, upon the record before the Court, it is impossible to find any prejudice to the public interest in requiring an answer to the question propounded.

This case is differentiated from *Brooke v. Covington*, 177 U. S. 459, where the information sought of the Collector of Internal Revenue was prohibited by a regulation of the Secretary of the Treasury made under authority of law and for the purpose of making more efficient the Internal Revenue Service, and also from such cases as [28] *Gody v. Pentland*, 85 Pa. 22, in which public officials are protected in their refusal to produce records on grounds

of public policy. Here the question of the public policy involved in the answer sought is as capable of being decided by the Court as by the Executive official, because apparently all the information surrounding the alleged privilege of respondent *in* before the Court. And upon this information, the Court is of the opinion that it is the duty of respondent to answer the question put to him. An analagous situation might be supposed if the judgment of a Court against a citizen was questioned because of the lack of jurisdiction in the Court to render the judgment, and the Court should refuse to permit an investigation as to the fact of such jurisdiction. If the Department of Labor has acted without authority, and an individual has been denied his liberty as a result of such action, it is most extraordinary for the Department to assert that public policy requires a concealment of the truth in regard to such lack of authority. Indeed, if the Department *had* authority to act, and that authority were questioned in a proper judicial proceeding by a Court having jurisdiction of the matter, it would seem reasonable that the request due by one co-ordinate branch of the Government to another would discountenance a concealment of the facts upon which the Department acted.

An order will be signed requiring the respondent to answer.

GOULD,
Justice.

[Indorsed]: Case No. 285. Plaintiff's Exhibit 2.
United States District Court, Western Dist. of

Washington, U. S. vs. Ching Hing. Filed Apl. 26, 1915. [29]

*United States District Court, Western District of
Washington, Northern Division.*

No. 2857.

In the Matter of Application of CHING HING for
a Writ of Habeas Corpus.

**Petition [to Vacate Order to Take Depositions and
to Deny Petition for Writ of Habeas Corpus].**

Comes now G. P. Fishburne, Assistant United States Attorney for the Western District of Washington, and requests the court as follows:

That the order to take depositions in the above-entitled action entered and filed on the 20th day of October, 1914, be vacated and set aside on the ground that on November 13, 1914, the Secretary of Labor himself personally reviewed the record and affirmed the decision of the Commissioner of Immigration at Seattle, excluding the applicant Ching Hing; and that the depositions were ordered taken for the purpose of showing that the decision was made by J. D. Densmore, the Solicitor of the Department of Labor, as Acting Secretary, while the Secretary and his assistant were present in the office, and further that J. D. Densmore could examine the appeal and assist the Secretary to arrive at his decision.

Wherefore, the question being now moot, the Respondent prays that the order be vacated and set aside and that the petition for a Writ of Habeas Corpus herein be denied.

Dated this 5th day of April, 1915.

CLAY ALLEN,
U. S. Atty.

G. P. FISHBURNE,
Assistant U. S. Atty. [30]

Received a copy of the within petition this 5th day of April, 1915.

BEELER & SULLIVAN,
Attorneys for Petitioner.

[Indorsed]: Petition. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Apr. 5, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [31]

*United States District Court, Western District of
Washington, Northern Division.*

No. 2857.

In the Matter of the Application of CHING HING
for a Writ of Habeas Corpus.

Answer to Petition [of G. P. Fishburne].

Comes now John J. Sullivan, attorney for the petitioner, Ching Hing, in answer to the petition of G. P. Fishburne, Assistant United States Attorney for the Western District of Washington, and states, alleges and answers as follows:

That the matter therein set up by said G. P. Fishburne, is outside the record and cannot be reviewed or taken *connissance* of by this Court, for the reason that if said Secretary of Labor did review the record and affirm the decision of the Commissioner of Immigration, in relation to the above-entitled case on

November 13, 1914, that the same was done while this Court had jurisdiction of the subject matter and of the petitioner herein and after a rule to show cause had been served upon Lewis F. Post, Assistant Secretary of Labor under seal of the Supreme Court of the District of Columbia, Honorable Ashley M. Gould, Justice, to show cause why he should not be directed to make full and direct response to interrogations propounded under a stipulation issued by Honorable Jeremiah Neterer, Judge of this Court, authorizing Thomas G. Lewis, Commissioner, to take said depositions; and in further answer, Ching Hing, through his attorney, respectfully informs the Court that no opportunity was given, counsel informing him when said alleged hearing was had, or that he be given permission to appear before the Honorable Secretary and present argument in behalf of said alien and petitioner, Ching Hing; and that the said action of the Secretary, if there was such an action, was arbitrary and contrary to law and oversteps the due procedure of this Court. [32]

Wherefore, Ching Hing, through his attorney, John J. Sullivan, respectfully prays that the petition of G. P. Fishburne, Assistant United States Attorney, be denied, and this Court proceed to hear the Writ upon its merits, after the determination of the Supreme Court in and for the District of Columbia, on the question now pending before Honorable Justice Ashley M. Gould.

BEELER & SULLIVAN,
Attys. for Petitioner, Ching Hing.

The United States of America,
Western District of Washington,
Northern Division,—ss.

John J. Sullivan, being first duly sworn on oath, deposes and says: That he is attorney for the petitioner herein; that he has read the foregoing Answer to Petition, knows the contents thereof, and believes the same to be true.

JOHN J. SULLIVAN.

Subscribed and sworn to before me this 21 day of April, 1915.

[Seal]

ADAM BEELER. [33]

*United States District Court, Western District of
Washington, Northern Division.*

No. 2875.

In the Matter of the Application of CHING HING
for a Writ of Habeas Corpus.

Memorandum Brief.

It would seem that very little need be said in answer to the Government's contention that your Honor should grant the petition of said counsel and dismiss the application of the petitioner, Ching Hing, for to do so at the present status of the case, would seem, in my humble opinion, to destroy and usurp the dignity of this Court by giving the right to an official of a department to supersede the jurisdiction of your Honor in determining this case upon the facts as the record shows at the time this appli-

cation was filed and return made therein.

The issue as it presents itself at this time, must be the same issue according to law, as presented itself at that time, and counsel has no right to read into the record any outside action not taken under the order or permission of this Court who had, and still has absolute jurisdiction over the subject matter and the person.

The petitioner alleged that he was illegally detained in that J. B. Densmore acted without authority in signing the order of deportation. The record shows respondent says the petitioner is detained on the order of the Secretary of Labor. This is denied by the petitioner, and the original mandate shows that the order of deportation was signed by J. B. Densmore, Acting Secretary. Respondent then, under my construction of the rules of evidence, must show that Mr. Densmore was Acting Secretary under the order of the Executive, because of the absence of the Secretary and Assistant Secretary, but the petitioner denies that the Secretary and Assistant Secretary *were* [34] *absent*. The burden then is upon the respondent to show that the Secretary and Assistant Secretary were absent when Mr. Densmore signed the deportation order of the petitioner, Ching Hing. I respectfully submit that if respondent, to meet the burden, cannot show that the order of deportation and detention was made by one having authority, the petitioner should be discharged.

There is no presumption of law that the Secretary and Assistant Secretary were absent on September 26th, or that the solicitor, Mr. J. B. Densmore, was

Acting Secretary. It is a question of fact to be proved by the one averring it, and again I submit that where the record shows that J. B. Densmore signed the warrant of deportation, and the Government in its return to the application of this petitioner on the 16th day of October, 1914, states that the Secretary affirmed the order of deportation, that the burden of proof is upon them to show that J. B. Densmore acted with authority.

This same identical question has been passed upon by the Honorable M. T. Dooling, Judge of the District Court of California, First Division, in the case of the Application of Quan Wy Chung, upon behalf of Tsuie Shee, his wife, and Quan Wy You, his son, for a Writ of Habeas Corpus, wherein he held that the appellants and petitioners therein were by Law entitled to appeal to the Secretary of Labor, and were entitled to have their appeal reviewed and determined by him, except in the absence of the Secretary and Assistant Secretary, when the solicitor might act, but if one or both were present, that the solicitor would be acting without authority, if it were proven that he did act; and that the determination of their appeal by the said solicitor, not authorized, is neither a fair hearing, nor due process of Law.

Wherefore, this petitioner, Ching Hing, respectfully submits that if it be proven that the Secretary or Assistant Secretary [35] were present in Washington when J. B. Densmore, solicitor, signed the order of deportation of this petitioner, Ching Hing, that the same was without authority, not due

process of Law, not a fair hearing, and that the petitioner, Ching Hing, should be discharged.

Respectfully submitted,
BEELER & SULLIVAN,
Attorneys for Defendant.

Copy of within Answer and Petition and Memorandum Brief received and due service of same acknowledged this 21st day of April, 1915.

WINTER S. MARTIN,
Assistant U. S. Attorney.

[Indorsed]: Answer to Petition and Memorandum Brief. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Apr. 21, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [36]

[Opinion of U. S. District Court.]

*United States District Court, Western District of
Washington, Northern Division.*

No. 2857.

May 11, 1915.

In the Matter of the Application of CHING HING
for a Writ of Habeas Corpus.

BEELER & SULLIVAN, For Applicant.
CLAY ALLEN, U. S. District Attorney,
GEORGE P. FISHBURNE, *Asst. U. S.*, for
Government.

NETERER, District Judge:

The petitioner alleges in substance that he arrived at the Port of Seattle on the 15th of August, 1914, and applied for admission; that he was given

a hearing and examination before the Immigration officers, and on the 27th of August, 1914, an order was issued by the Commissioner of Immigration at Seattle, denying admission and ordering his deportation; that an appeal was prosecuted to the Secretary of Labor, and that on September 26, 1914, the order of deportation was confirmed; that his appeal was determined by J. B. Densmore, the Solicitor of the Department of Labor, and not by the Secretary of Labor, or the Assistant Secretary of Labor, each of whom, at the time of the determination of said appeal, was at his respective office in the City of Washington, and that the determination of his appeal by another not authorized is not a fair hearing and does not accord to him due process of law. By further supplemental or amended petition filed on the 25th day of January, 1915, petitioner states that he was denied the right of counsel to present his appeal before the Secretary of Labor, and was deprived of a fair hearing. A return was made to the writ issued upon the petition, in which it is admitted that the petitioner was ordered to be deported after a fair hearing and a denial that the appeal was not determined by [37] the proper officers, or that any rights have been withheld from the petitioner. Upon the return day it was stipulated between George P. Fishburne, Assistant United States District Attorney, and the attorneys for the petitioner, that the depositions of Lewis F. Post, Assistant Secretary of the Department of Labor, and Cory M. Staden, both of Washington, D. C., should be taken before Thomas G. Lewis, a notary public, of Washington,

D. C. Thereupon the said Thomas G. Lewis was appointed Commissioner to take the depositions of the witnesses named. The witnesses declined to testify because the answer might be prejudicial to the public interest, and a rule was issued by Justice Gould of the Supreme Court of the District of Columbia, returnable November 14, 1914, directed to Lewis F. Post, Assistant Secretary of Labor, requiring him to show cause why he should not answer certain questions propounded to him pursuant to the said Commission. On the 13th day of November, 1914, the Secretary of Commerce and Labor examined the appeal of the petitioner herein and confirmed the decision heretofore rendered by the "Acting Secretary" J. B. Densmore, and the decision and order of deportation of the Commissioner of Immigration. On the 25th of April, a further return was made to the amended petition in which all of the admissions are made as in the original return, and the further statement that the petitioner had appealed from the decision of the Commissioner to the Secretary of the Department of Labor, and that the said Secretary, after due consideration, had confirmed the decision of the Commissioner of Immigration in the manner provided by law. On the 5th of April, 1915, was filed a petition by the Assistant United States District Attorney, requesting that the order entered pursuant to stipulation on the 20th of October, 1914, for the taking of the testimony of Lewis F. Post, Assistant Secretary of Labor, be [38] recalled, for the reason that on the 13th of November, 1914, the Secretary of Labor had personally reviewed the record

and affirmed the decision of the Commissioner of Immigration. Objection is made to this petition, and also to the amended or supplemental return, and it is urged that the Court should not permit to be filed or to consider upon this hearing the decision of the Secretary of Labor rendered since the inauguration of this proceeding but that the matter should be heard and determined upon the record as it existed at the time of the filing of the petition.

I do not think that the position of counsel for the petitioner is tenable. It is highly technical, and would not lead to any conclusion of the rights of the petitioner in this controversy. The petitioner in this case could not hope to be released from custody and permitted to unlawfully enter the United States while his appeal was pending before the Secretary of Labor. If the contention is correct that the "Acting Secretary" was not clothed with authority by reason of the presence of his superiors qualified to act, then the appeal had not been heard and the threatened deportation of the petitioner was simply premature, and the most that the petitioner could hope for would be a delay of the deportation until the proper officer of the department could determine his appeal. The record discloses that the Secretary of Labor did personally determine this appeal and adversely to the petitioner. The Secretary of Labor having acted, the reason for the disclosure sought by the deposition and interrogatories of the Assistant Secretary of Labor is disposed of. There is nothing at issue, and I think the Commission to take the said deposition should be recalled. Courts

are not organized to do idle things, but to determine issues presented, decreeing to the respective parties the rights as law or equity may direct. [39] The entire record now being before the Court, the Court should consider the record now and determine the respective rights of the parties. The Secretary of Labor having personally reviewed the decision of the Commissioner of Immigration, it is unnecessary to examine into the right of the "Acting Secretary" in the premises. The only other matter that remains for determination is the contention that applicant was denied the right of having his counsel appear before the Secretary of Labor for the purpose of presenting such further evidence and oral argument as he desired in support of his appeal, and whether such denial was depriving the petitioner of a fair hearing or of due process of law. No provision of law according to an alien the right of counsel before the Secretary of Labor has been called to my attention; nor do I know of any such provision. Circuit Judge Lacombe, of the Second Circuit, in *U. S. vs. Williams*, 190 fed. 898, says:

"There is nothing in the statute which calls for the presence of counsel at the examination of aliens preliminary to admission; nothing to indicate that it was the intent of Congress that these investigations in hundreds of thousands of cases touching the qualifications of an alien seeking to enter were to be conducted as trials in court, with counsel present to represent the alien, witnesses called to testify, and elaborate examinations and cross-examinations of them."

There is nothing in the rules of the Department in the determination of appeals before the Secretary of Labor which would justify a conclusion that counsel could appear before the Secretary and argue in support of his petition or offer further testimony, as a matter of right. The great volume of business pending in the Department of Labor would make such a practice impossible. Appeals are determined upon the briefs presented, and no opportunity is afforded for argument, unless by special courtesy. From the record in this case, there is nothing to indicate that the petitioner did not have a fair hearing, and [40] that every issue presented was determined by the proper official authorized by law. The Commission to take depositions is recalled.

The Writ is discharged and the petitioner remanded to the custody of the Department of Immigration.

JEREMIAH NETERER,
Judge.

[Indorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, May 11, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [41]

*United States District Court, Western District of
Washington, Northern Division.*

No. 2857.

In the Matter of the Application of CHING HING
for a Writ of Habeas Corpus.

Order Dismissing Writ, etc.

The above-entitled matter having come regularly on for hearing on the 26th day of April, 1915, on the petition for a Writ of Habeas Corpus, the Writ of Habeas Corpus and respondent's return thereto, and the Court having heard the arguments of counsel and being fully advised in the premises, and having filed a written opinion herein;

It is hereby ordered that said writ be, and the same is hereby dismissed, and the petition remanded to the custody of the Commissioner of Immigration.

Dated this 29th day of May, 1915.

JEREMIAH NETERER,
United States District Judge.

To the entry of the above order the petitioner excepts, which exception is hereby allowed.

JEREMIAH NETERER,
United States District Judge.

[Indorsed]: Order Dismissing Writ. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, May 29, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [42]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2857.

In the Matter of the Application of CHING HING
for a Writ of Habeas Corpus.

**Stipulation [as to Respondent's Exhibits "A" and
"B"].**

It is hereby stipulated and agreed by and between the attorneys for the petitioner and respondent herein, that the respondent offers in evidence two exhibits marked respectively "A" and "B," and the petitioner objects thereto on the ground that they are incompetent, irrelevant and immaterial, because the Immigration Department did not have jurisdiction to review the case after the issues were joined before the Court, and the entire record as shown by the Return to the original writ before this Court.

Dated this 26th day of April, 1915.

JOHN J. SULLIVAN,
Attorney for Petitioner.

CLAY ALLEN,
G. P. FISHBURNE,
Attorneys for Respondent.

[Indorsed]: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Apr. 26, 1915. Frank L. Crosby, Clerk.
By E. M. L., Deputy. [43]

[Defendant's Exhibit "A" (Part of)—Memorandum
and Digest of Evidence Attached to Appeal
Record In Re Chin Hing.]

Incl. No. 7871.

DEPARTMENT OF COMMERCE AND LABOR.

Washington, November 20, 1914.

I HEREBY CERTIFY That the annexed is a true copy of the original memorandum and accompanying digest of evidence, which were attached to the appeal record in the case of Chin Hing, when said record was submitted to the Acting Secretary of Labor under date of September 22, 1914, and also when the said record was submitted to the Secretary of Labor under date of November 13, 1914, bearing the notations of approval of the Acting Secretary under date of September 25, 1914, and of the Secretary under date of November 13, 1914, on file in the Bureau of Immigration.

A CAMINETTI,
Commissioner-General of Immigration.
(Official Title.)

OFFICE OF THE SECRETARY.

I HEREBY CERTIFY That A. Caminetti who signed the foregoing certificate, is now, and was at the time of signing Commissioner-General of Immigration and that full faith and credit should be given his certification as such.

IN WITNESS WHEREOF, I have hereunto subscribed my name, and caused the seal of the Department of Commerce and Labor to be affixed this 20th

day of November, One thousand nine hundred and fourteen.

[Seal] LOUIS F. POST,
Assistant Secretary of Commerce and Labor. [44]

(Copy)

In re Appeal, Case of CHIN HING, Alleged Minor
Son of Merchant.

MEMORANDUM FOR THE ACTING SECRETARY.

After carefully considering the evidence presented in this record, the Bureau concurs in the excluding decision rendered by the Commissioner at Seattle on the ground that the relationship claimed has not been shown to exist. It also believes that applicant should be denied because the mercantile status of the alleged father is not reasonably established.

It is recommended that the exclusion of applicant is ordered and his deportation directed.

(Signed) F. H. LARNED,
Acting Commissioner-General

9/25/14.

Approved: (Signed) J. B. D., Acting Secretary.

Note: Local counsel, Corry M. Stadden, Esq., requests an opportunity to present an oral argument.

11/13/14

Approved: (Signed) W. B. W., Secretary. [45]

BUREAU OF IMMIGRATION

(Copy)

53817/43

Washington, D. C., September 20, 1914.

DIGEST OF EVIDENCE, CASE OF CHIN
HING.

The applicant in this instance is almost a major, having been 20 years and 8 months old at time of arrival. Nevertheless, he seeks admission by virtue of his minority and the claimed status of his alleged father. The officials at New York and Seattle have conceded the mercantile status of the alleged father, Chin Shew, but the Bureau does not agree with them.

It appears that Chin Shew claimed he has a \$200 interest in the Quong Wo Chong Co., 25 Pell Street, New York City, and is employed there as book-keeper. His assertions are corroborated by the testimony of the manager of said firm and two white witnesses who deal with him in the store conducted by said firm. The officials in New York have known Chin Shew in connection with the business of Quong Wo Chong Co. Admitting the employment of Chin Shew in a mercantile establishing at a salary of \$30 or \$40 a month, it is not believed that his ownership of an interest of \$200 out of a total capitalization of \$11,000 (shown by a prior record, but not stated here) is sufficient to make him a merchant within the meaning of the law. It is also shown by the record that there are 14 active partners out of a total of 68, but the investigating officer failed to report whether they were all engaged in the store and

whether the business was able to support that number of employees. Altogether, the Bureau cannot get away from the impression that Chin Shew's investment in this business was made and is retained for the sole purpose of securing a status that will enable him to bring "sons" to this country. [46]

The evidence on the issue of relationship consists of the statements of Chin Shew, the applicant and a Chinese witness. The particular point urged against the proof by the Commissioner is that Chin Shew has failed to show he was in China at a time to permit of his paternity of a son the age given for applicant. The unsatisfactory testimony of the applicant, though in agreement in most respects with that of the alleged father, and one serious discrepancy which has been overlooked at the port, constitute, in the Bureau's judgment, just as strong a ground for holding that the relationship has not been reasonably established. The discrepancy is with respect to the paternal grandfather, applicant having stated, in effect, that this relative is dead and he has never seen him, while the alleged father said his father died at his home in 1900, which would be within the memory of applicant. Concerning his presence in China at the essential time, the alleged father claimed he left his home in 1893, going to Havana, Cuba; and that he was admitted at New York about December, 1893, as a Section Six merchant. The arrival records fail to verify admission at New York. It is possible that Chin Shew entered this country in the manner claimed, although he has not given the correct date, intentionally or

otherwise, but if he did he was not entitled to admission. The Bureau and department have seen a number of cases of Chinese who were permitted to go in transit through this country to Havana, Cuba, in the early nineties, and who later were erroneously permitted to enter this country from that place by virtue of Section Six certificates issued to them by the Chinese Consul there as merchants of some city in China, and *visaed* by American Consular officers without the investigation contemplated by the law having been made. [47]

Local counsel, Corry M. Stadden, Esq., has requested a re-examination of the New York records in an attempt to verify the landing of Chin Shew in December, 1893. He has given additional names by which this man might have been recorded. In view of what has been said hereinbefore as to the relationship and the mercantile status, there would be nothing gained by withholding decision for the result of another search of the records to show that Chin Shew was admitted in December, 1893, or about that time, since that is not a decisive factor in the case. The request has, accordingly, been denied.

BRIEF filed by counsel is next hereunder. His request that decision be withheld a few days for a report on a re-examination of the records of arrivals at New York should have been withdrawn by counsel in view of the Bureau's denial of his application for a re-examination of said records.

The statement he was not "permitted to see the Finding or Decree upon which the officers at the port denied admission," is intentionally erroneous. The

Commissioner at Seattle designates his excluding decision "order rejecting applicant." Counsel was shown the order in this case on the basis of the Secretary's letter to him in the Yu Sher Suek case (53,817/42). His attention was called to the erroneous nature of his statement, which he declined to change.

The rule of evidence which counsel cites to support his contention that the failure of the alleged father to prove his admission in December, 1893, does not affect the question of paternity, if applicable, would not help him in this instance. The alleged father, not having shown he entered this country from Cuba at the time stated, has not proven he was in China at the essential time to make access possible, so there is no presumption favorable to the claimed relationship. [48]

The alleged father does assert he has been a merchant since entering this country in 1893. It is noted, however, that until about a year ago his interest in the store where he is now employed is said to have been only \$100.

[Indorsed]: Case No. 2857. Part of Defendant's Exhibit "A." United States District Court, Western Dist. of Washington. U. S. vs. Ching Hing. Filed Apl. 26, 1915. ———, Clerk. [49]

**[Defendant's Exhibit "B"—Telegram and Letter
Concerning Appeal In Re Chin Hing.]**

U. S. DEPARTMENT OF LABOR.

IMMIGRATION SERVICE.

Office of the Commissioner.

Seattle, Wash.

United States of America,
State of Washington,
County of King,—ss.

I, Henry M. White, do hereby certify and declare that I am the United States Commissioner of Immigration in and for the State of Washington, and that as such officer I am the lawful custodian of all papers, correspondence, and records relating to the departure from and return to the United States of persons traveling via any port in said District; that the annexed telegram dated Washington, D. C., November 13, 1914, and signed Larned (Acting Commissioner-General), and letter of November 20, 1914, signed by A. Caminetti, Commissioner-General, concerning the appeal case of Chin Hing, were received in due course of business from the Bureau of Immigration, and are authoritative in all respects covering their subject matter.

Witness my hand and official seal this 8th day of April, 1915.

[Seal]

HENRY M. WHITE,
Commissioner.
HMN. [50]

TELEGRAPH COMMERCIAL TELEGRAM.

38 SF F 44 govt

1241P.

Washington DC Nov. 13-14

Immigration Service.

Seattle Wn.

Secretary has to-day personally reviewed record in case Chin Hing and affirmed your decision excluding said applicant advise United States Attorney and ask him to make proper representations to Court so that writ may be dismissed and deportation effected.

LARNED.

This message phoned at 110 P. to Sargent by F.
[51]

U. S. DEPARTMENT OF LABOR.

BUREAU OF IMMIGRATION.

WASHINGTON.

In answering refer to No. 53817/43.

November 20, 1914.

Commissioner of Immigration,

Seattle, Washington.

In response to your telegram of the 19th instant, the Bureau incloses a certified copy of the memorandum, dated September 22, 1914, and of the digest of evidence in the case of Chin Hing attached to such memorandum, with which the said case was submitted to the Acting Secretary, and on which memorandum the Acting Secretary, under date of September 25, 1914, wrote "approved," signing his initials "J.B.D." Under date of November 13, the said memorandum and digest, together with the entire record, were submitted to the Secretary of Labor,

and after carefully considering the case, he wrote on the memorandum, as you will see from the certified copy, "approved," signing his initials "W.B. W."

As your telegram indicates that what is desired is a certified paper showing the Department's final action, it is believed that the inclosed will serve your purpose, without withdrawing from the Bureau's files the entire record, of which you already possess a complete copy with the exception of the notation on the memorandum of the Secretary's approval.

A. CAMINETTI,

AWP-s.

Commissioner-General.

Incl. No. 7871.

[Indorsed]: Case No. 2857. Defendant's Exhibit "B." United States District Court, Western Dist. of Washington. U. S. vs. Ching Hing. Filed Apl. 26, 1915. ———, Clerk. [52]

No. 5199.

UNITED STATES OF AMERICA.

DEPARTMENT OF STATE.

To All to Whom These Presents Shall Come, Greeting:

I certify that the document hereunto annexed is a true copy from the original in the archives of this Department.

(Executive Order authorizing and directing Mr. John B. Densmore, Solicitor of the Department of Labor, to perform the duties of Secretary of Labor, during the absence of the Secretary of Labor and the Assistant Secretary of Labor—Signed June 5, 1913.)

IN TESTIMONY WHEREOF I, W. J. Bryan, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the chief clerk of the said department, at the City of Washington, this Twenty-eighth day of September, 1914.

[Seal]

W. J. BRYAN,
Secretary of State.
By Ben G. Davis,
Chief Clerk.

[Plaintiff's Exhibit No. 1—Executive Order.]

EXECUTIVE ORDER.

Pursuant to the authority contained in Section 179 of the Revised Statutes, I hereby authorize and direct John B. Densmore, Solicitor of the Department of Labor, to perform the duties of Secretary of Labor during the absence of the Secretary of Labor and the Assistant Secretary of Labor.

WOODROW WILSON.

The White House, June 5, 1913.

(No. 1783.) [53]

[Indorsed]: Case No. 2857. Plaintiff's Exhibit 1. United States District Court, Western Dist. of Washington. U. S. vs. Ching Hing. Filed Apl. 26, 1915. [54]

[Respondent's Exhibit "A"—Record of Department
of Labor.]

U. S. DEPARTMENT OF LABOR.
IMMIGRATION SERVICE.

Immigration File

No. 31992.

Subject: Chin Hing, minor son of merchant, New York, N. Y. No. 44, ex. S. S. "Protesilaus," August 5, 1914. Rejected August 27, 1914. Appealed September 2, 1914. Excluding decision affirmed September 25, 1914. Writ of Habeas Corpus secured Sept. 29th. Exhibit A. [55]

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[Affidavit of Chin Shew.]

COPY.

DEPARTMENT OF LABOR.

In the Matter of the Application of CHIN HING, a Minor Son of a Merchant, to the United States.

(PHOTOGRAPH)
Chin Hing,
taken at Seattle.

State and County of New York,—ss.

Chin Shew, being duly sworn, deposes and says: That he is a Chinese merchant and a *bona fide* member of the mercantile firm of Quong Wo Chong & Co., doing business of buying and selling merchandise at No. 25 Pell Street, in the Borough of Manhattan, City of New York; that he has been such a merchant for a period more than a year last past, during which time he has not been engaged in the performance of any manual labor other than which was necessary for the proper conduct of his business as a merchant.

Deponent further says that he has a minor son, Chin Hing by name, now residing in China, whom he is desirous of bringing to the United States and to join deponent in his business. For the purpose of identification and aiding the entry and admission of said Chin Hing to the United States, deponent has attached hereto his photographic likeness on the left of this application and his son's on the right.

(Signature in Chinese.)

Subscribed and sworn to before me this 8th day of October, 1913.

(Signed) LAWRENCE NAUGHTON. [57]

[Affidavit of Fong Gow Mon.]

COPY.

State, County and City of New York,—ss.

Fong Gow Mon residing in the City of New York, being duly sworn, says; that he is personally and intimately acquainted with Chin Shew and his family; that he recognizes the photograph on the left-hand side of the application hereto attached is that of Chin Shew himself, and the photograph on the right-hand side is that of Chin Hing, son of Chin Shew, whom deponent frequently saw during his last visit to China.

(Chinese signature.)

Subscribed and sworn to before me this 8th day of October, 1913.

(Signed) LAWRENCE NAUGHTON. [58]

[Affidavit of Harry W. Dremus and Joseph J. Hush.]

COPY.

State, County and City of New York,—ss.

The undersigned, being duly and severally sworn, depose and say; that they are persons other than Chinese; that they are personally acquainted with Chin Shew, whose application is hereto annexed; that they know said Chin Shew is a member of the firm of Quong Wo Chong & Company, engaged in buying and selling merchandise at No. 25 Pell Street, in the Borough of Manhattan, City of New York, for more than a year last past, during which time, to the best of deponents' knowledge and belief, said Chin Shew

has not been engaged in the performance of any manual labor other than that which was necessary for the conduct of his business as a merchant; that they recognize the photograph attached to the preceding document on the left-hand side to be the true likeness of said Chin Shew.

HARRY W. DREMUS,
29 Lafayette St.,
N. Y. City.

(Signed) JOSEPH J. HUSH,
585 Washington St.,
N. Y. City.

Subscribed and sworn to before me this 8th day of October, 1913.

(Signed) LAWRENCE NAUGHTON. [59]

**[Examination of Chan Hing at Seattle, Wash.
August 7, 1914.]**

#44, ex S. S. Protesilaus, 8-5-14 No. 31,922.

In the Matter of the Application of CHIN HING
for Admission to the United States as the Minor
Son of an Alleged Domiciled Merchant of New
York City.

Seattle, Washington, August 7, 1914.

Inspector—MANGELS.

Interpreter—ENG NING.

Stenographer—SEIDLE.

DESCRIPTION: Age 20, height 5'-4" scar near left temple, scar near center forehead, pock marks above and between eyebrows, pock marks on nose and chin, scar and two moles right of neck, pock marks back of each hand, rims of ears

flatened and without folds. Destined to New York to join father in the Quong Wo Chong Co., 25 Pell St. Chan Family. Speaks no English.

Applicant sworn, testified as follows:

Q. What are your names?

A. Chan Hing, I am not married and have no other names, I am of the Chan family.

Q. Have you ever been in the United States before or tried to gain admission to this country?

A. No.

Q. How old are you and where were you born?

A. I am 21 years old and was born K. S. 19, 11th month, 11th day, in Chong On Lee village, Hoiping district, China.

Q. Are you 21 years old according to the Chinese way of reckoning?

A. I am 21 years old according to the Chinese way of reckoning.

Q. Have you any sisters or brothers?

A. I have one older brother named Chan Gong, 23 years old. He is now in China and is married. His wife's name is Yung She, natural feet. He has no children.

Q. When did your brother marry? A. S. H. 3.

Q. Did you ever have any sisters or any brothers than Chan Gong? [60]

A. I have two more younger brothers.

Q. Why didn't you mention them right away?

A. I didn't understand what you said.

Q. Give me the names and ages of your younger brothers?

A. Chan Wai 14 years old and Chan Hoy 13 years old.

Q. Have any of your brothers ever attempted to enter the United States? A. No.

Q. Do you know the birthdays of any of your brothers?

A. Chan Wai was born K. S. 26, 5th month, 8th day and Chan Hoy was born K. S. 27, 5th month, 18th day.

Q. Don't you know the birthday of Chan Gong?

A. He was born K. S. 17, 12th month, 12th day.

Q. Who are your parents and where are they?

A. My father's name is Gim Fong now *now* in New York and my mother's name is Woo See, bound feet, 50 years old, from Suey Mon village, Hoiping district. She is now in China.

Q. Are you or are any of your brothers adopted children of Gim Fong? A. No.

Q. How many wives has your father? A. One.

Q. Where is your father in this country and what does he do?

A. He is a merchant of the Quong Wo Chong Company in New York, I don't know the street.

Q. Do you remember ever seeing him?

A. I saw him in China in S. H. 1.

Q. How long did he remain in China then?

A. About a year— My father went to China in K. S. 34 and stayed there until S. H. 1.

Q. What was your father doing while he was in China at that time? A. He did nothing. [61]

Q. What were you and your brothers doing while your father was in China?

A. We were attending school at that time.

Q. Where were you and your brothers going to school at that time?

A. I went to the Chan See Dai Dung ancestral hall in my village. My brothers went to the same school. My teacher was from another village and my younger brothers had a teacher from my village. My elder brother attended school in the back part of the school building but in a higher class. When my father was in China my younger brothers were not attending school.

Q. You stated a moment ago that they went to the same school that you did but that they had a different teacher, did you not? A. I didn't say that.

Q. Did your father know your teacher and your brother Chan Gong's teacher?

A. Yes, my father knew them. My teacher's name was Chan Seow Fun and Chan Gong's teacher's name was Chan Kay Kuk.

Q. Has your father Gim Fong another name?

A. Yes, Chan Sue, Gim Fong is his marriage name.

Q. Who are your father's parents and where are they?

A. My father's father's name is San Jen and I was told by my mother that he died. My father's mother is living, her name is Woo Shee, bound feet, 74 years old. She lives alone in my village.

Q. How far is her house from the one in which you live?

A. There is one house between hers and our house.

Q. Was she living there while your father was last in China? A. Yes.

Q. How large is your grandmother's house?

A. It is a regular five room Chinese house.

Q. She lives alone in a five room house?

A. Yes. [62]

Q. How large is Chung On Lee village?

A. 30 houses altogether and six rows.

Q. Where is your father's father buried?

A. At Ka Seuk Loung a little over 4 lees from my village.

Q. Has your father any sisters or brothers?

A. My father has one younger brother, no sisters, his name is Chan Hong and his marriage name is Guey Fong.

Q. What family has he and where does he live?

A. His wife's name is Soo Hoo Shee, a bound foot woman. He has two boys and one daughter. The boys' names are Che Sing, 13 years old, and Hung Dong, 5 years old. The daughter's name is Ah Seum, 10 years old.

Q. Is that brother of your father's now in China?

A. Yes, he is a farmer in China.

Q. Where does that brother live?

A. He lives in the house between my house and my grandmother's house.

Q. How many houses does your father own in the village?

A. He owns one house, my uncle owns one house and my grandmother owns one house.

Q. Who are your mother's parents and where are they?

A. I don't know my mother's names. I never saw them. They live in Hoy Sin village.

Q. Has your mother any brothers or sisters?

A. No.

Q. Besides your father is there anyone in the United States who you have ever seen in China?

A. I only know Fong Goon who is living in New York but I don't know what he does. I saw him in China in S. H. 3. He came to our village while I was standing at the front of our school. He asked me where the house of Chan Sue's family was and I told him I was his son. He brought \$30 and a letter home to my mother [63] from father. That is how I know him.

Q. Did he go with you to the house at that time?

A. Yes.

Q. Did he see your mother and your three brothers there?

A. He just saw me, my mother and brother Chan Hoy.

Q. Did that man ever come to your house again?

A. No.

Q. Do you know where he lives in China and what family he has?

A. I understand he lives in the Lung Gong village. I have never been there and do not know what family he has.

Q. Did the man deliver the money and letter to you or did he deliver them to your mother when you took him to the house?

A. He delivered them to my mother.

Q. Did he enter your house and take any meals there?

A. He just came into the house for a few minutes but took no meals.

Q. Did he enter the school with you? A. No.

Q. Did he visit any one else in your village?

A. No.

Q. Where were your brothers Chang Gong and

Chan Wai when he called at your house?

A. Chan Wai was in the house, I don't know where Chan Gong was.

Q. I thought you said before that only Chan Hoy was home at that time?

A. No, Chan Hoy was in school at that time and Chan Wai was at home.

Q. How far is Chan See Dai Dung ancestral hall from your house?

A. From here to that building. (Indicating distance of about 50 feet.)

A. Did Fong Goon meet your father's mother or your father's brother or his family while he was in your village? A. No. [64]

Q. Did any incident happen while your father was in China such as a fire, robbery, accident, flood, marriage, birth or death, about which he can be questioned?

A. When father reached our house from America there were robbers entered our house two days after his arrival and robbed us. It was in the night-time but I don't know what they got. They broke in the door.

Q. Do you know if they took anything?

A. Yes, they took lots of things but I don't know what.

Q. Is there any other incident that you remember which happened while your father was in China?

A. The same year my father arrived there was a flood and it flooded our house. The water was a little higher than that door. (Indicating height of 7½ feet.)

Q. How long did the flood last?

A. One or two days.

Q. Whose photograph is this? (Indicating photograph on identification paper.)

A. That is my father and the one beside him is mine.

Q. Have you any further statement to make or any other evidence or testimony to introduce?

A. No.

Q. Have you understood the interpreter well during your examination? A. Yes.

Copy of applicant's signature: (Chinese)

Sig.

Attest: SEIDLE, STENOGRAPHER. [65]

[Reports, August 22, 1914, Inspector Wiley to
Inspector at New York.]

U. S. DEPARTMENT OF LABOR.

IMMIGRATION SERVICE.

Office of Chinese Inspector in Charge District of
New York and New Jersey.

17 State Street, New York, N. Y.

In Answering refer to File No. 2725/80.

August 22, 1914.

Chinese Inspector in Charge,

New York, N. Y.

I return herewith papers in the case of Chin Hing, ex S. S. "Protesilaus," Seattle, August 5, 1914, applying for admission as the minor son of Chin Shew, alleged merchant and member of the firm of Quong Wo Chong & Co., 25 Pell St., this city, and have to report as follows:

I have examined the alleged father, the identifying witness Fong Goon Moon alias Fong Yuen Mon,

the manager of the firm of Quong Wo Chong & Co. and the statutory witnesses, and transcript of the sworn statements is hereto attached. This firm has a well-stocked store at 25 Pell St. and does a considerable business in Chinese merchandise. The statutory witnesses are reputable business men and have gained their knowledge of the mercantile status of Chin Shew through business relations with him as a member of the firm, and I might also state that Chin Shew is known to be *to be* actively engaged in this store. As a partnership list of this firm was filed in this office on May 1st, 1913, in connection with the case of Hor Yin Yee, which is now on file in the Seattle office, and the manager states that no changes have been made in the firm since that time, no list was filed in the present case. The list referred to contains the name of Chin Gim Foon, which is the marriage name of Chin Shew, as an active member of the firm.

A search of the Custom-house records covering admissions of [66] Chinese at this port during the latter part of 1893 was made in an effort to verify the claimed admission of Chin Shew, but they do not disclose that anyone was admitted under that name during that period.

The alleged father and the witness Fong Goon Moon testified in an unhesitating manner and impressed me that they were telling the truth. No material discrepancies appear in their statements.

ALBERT E. WILEY,
Chinese Inspector. [67]

[**Examination of Chin Shew at New York, August
17, 1914.**]

Office Chinese Inspector,
N. Y. City.

August 17, 1914.

In the Matter of CHIN HING, ex S. S. "Protesilaus," August 5, 1914, Applying for Admission at Seattle was the Minor Son of Chin Shew, Merchant and Member of the Firm of Quong Wo Chong & Co., 25 Pell St., New York City.

A. B. WILEY, Inspector.

LOUIS FONG, Interpreter.

F. J. MASTERSON, Stenographer.

Q. What is your name?

A. Chin Shew. (Sworn.)

Q. What is your occupation?

A. I am the bookkeeper in the firm of Quong Wo Chong, 25 Pell St.

Q. How much interest have you in that firm?

A. Two hundred dollars.

Q. When did you obtain that interest?

A. I invested one hundred dollars at first, and last year the firm was reorganized and I invested another hundred dollars.

Q. What is the total membership of that firm now?

A. 68 members.

Q. What is the total number of active members?

A. Fourteen.

Q. During the past year have you given your entire time to your duties as the bookkeeper of that

firm? A. Yes, sir.

Q. Who are your white witnesses?

A. Charley Hirsch's boy and Mr. Doremus.

Q. Have you ever had any business relations with them as member of the firm?

A. Yes, sir; I give them orders and the manager pays the money.

Q. Prior to becoming a member of that firm what was your occupation?

A. I was a member of the firm of Tuck High & Co.

Q. When did you first come to the United States?
[68]

A. K. S. 19, 7th month, in the first part of the month. (August, 1893.)

Q. How did you enter the United States?

A. I went to Havana, Cuba, and was in business there for a few months, then I came here to New York as a Section 6 merchant.

Q. Do you know the name in which your paper was made out? A. Chin Shew.

Q. Do you know the name of the steamer upon which you came from Havana? A. No.

Q. Upon your arrival in New York what did you do?

A. I arrived in New York, in the 11th month, in the middle part of the month, in K. S. 19 (December, 1893); I made a mistake before. I got to New York about the 20th day of the 11th month (December 27, 1893) and then I went to Philadelphia and joined the firm of Kwong Yuen Chung, 922 Race St. and stayed there until K. S. 25, when I went to China.

Q. What month in K. S. 25 did you leave for China?

A. 6th month, K. S. 25, through San Francisco.

Q. Do you know the name of the steamer upon which you departed? A. "Rio de Janeiro."

Q. What kind of papers did you have?

A. Merchant paper, member of the firm of Kwong Yuen Chung.

Q. How long did you remain in China on that visit?

A. A little over a year, and then returned in K. S. 26.

Q. What month?

A. About the 7th month, on the S. S. "Coptic."

Q. Have you made any other trips to China?

A. After I returned in K. S. 26 I stayed in Philadelphia a little over a year, and then came to New York in K. S. 28 and joined the firm of Tuck High & Co. in K. S. 29. Then I went to China [69] in K. S. 34, 4th month, in the first part of the month, through Malone, New York, and returned to the United States S. T. 1st year. I left China in the 7th month and arrived in New York 8th month, 20th day (October 2, 1909).

Q. Have you been back to China since that time?

A. No, sir.

Q. Have you the certificate upon which you were admitted from Havana?

A. I thought it was not very valuable so it has been mislaid.

Q. Where you born?

A. Chong On Village, Hoy Ping District, China.

Q. What was your father's name? A. Sen Jin.

Q. Is he living?

A. No, he died in K. S. 26.

Q. What is your mother's name? A. Woo She.

Q. Has she natural or bound feet?

A. Bound feet.

Q. Is she living?

A. Yes, she is living in my home village.

Q. What house is she living in?

A. She lives in the same row with me but two houses away.

Q. How large a house has she?

A. Two bedrooms and one parlor and two kitchens and one open court.

Q. Are you married? A. Yes, sir.

Q. What is your wife's name? A. Woo She.

Q. Are her parents living? A. No.

Q. What village did your wife come from? [70]

A. Suey Mun.

Q. Did you ever hear of a village named Hoy Sin?

A. That is my mother's home village.

Q. Your alleged son stated that his mother's parents lived in the Hoy Sin village.

A. I think my boy is mistaken; that is my mother's home village.

Q. Has your wife any brothers or sisters?

A. No.

Q. Have you any brothers or sisters?

A. One younger brother, no sisters.

Q. What is your brother's name?

A. Chan Hong.

Q. What is his marriage name?

A. Guey Fong.

Q. What is his wife's name?

A. Soo Hoo She.

Q. Has she natural or bound feet?

A. Bound feet.

Q. Have they any children?

A. When I was there, two sons and one girl.

Q. What is the name of the oldest son?

A. Chin She Sing.

Q. How old is he at the present time?

A. I think about 12 or 13.

Q. What is the name of the next boy?

A. Chan Hung Gong.

Q. How old is he?

A. About five or six years old.

Q. What is the daughter's name?

A. Ah Suen.

Q. How old is she? [71]

A. About eleven.

Q. What is your brother doing in China?

A. Farming.

Q. Where does he live with reference to your house? A. In back of my house.

Q. In the same row? A. Yes, sir.

Q. Where does he live with reference to your mother's house?

A. He lives between my house and my mother's.

Q. Do you own any other property in that village besides the house in which you live? A. No.

Q. Have you any children?

A. Four sons, no daughters.

Q. Did you ever have a daughter? A. No.

Q. What is the name of the oldest son?

A. Chin Quong, 23.

Q. What was the date of his birth?

A. He was born in K. S. 17, 12th month, 11th day.
(January 10, 1892.)

Q. What is the name of your next son?

A. Chin Hing.

Q. What is the date of his birth?

A. K. S. 19, 11th month, 11th day. (December 18, 1893.)

Q. Where were you at the time of his birth?

A. I was in Philadelphia.

Q. How long had you been in the United States prior to his birth?

A. I arrived in Philadelphia in the 11th month, and had a letter from home in the first month of the following year saying that my son was born in China
[72]

Q. Do you remember being examined in this office in April, 1908, in connection with your application to have your status preinvestigated?

A. Yes, I remember being examined at that time.

Q. In giving the dates of the births of your children at that time, did you give the ages in American or Chinese reckoning?

A. I made a mistake that time; I should have told the English dates that time.

Q. When you said that your son Chin Hing was 16 years old, did you give *it Chinese* or English?

A. In Chinese.

Q. You told the Chinese dates at that time?

A. Yes, sir.

Q. How old is Chin Hing now, according to American dates? A. 21.

Q. That is, he will be 21 next birthday; is that right? A. Yes.

Q. What is the name of your next son?

A. Chin Wai.

Q. What is the date of his birth?

A. K. S. 27, 5th month, 18th day. (July 3, 1901.)

Q. Are any of your sons married?

A. The oldest is married.

Q. What is his wife's name? A. Yung She.

Q. Has he any children? A. No.

Q. When was he married?

A. S. T. 3, I think in the 6th month.

Q. Have any of your sons ever applied for admission to the United States? [73]

A. Chin Quong applied and was denied.

Q. What is your home village in China?

A. Chong On.

Q. How large is that village?

A. When I was there, about 25 or 26 houses.

Q. How large is it now?

A. I don't know how many houses now.

Q. How many rows? A. Five rows.

Q. Have you heard anything about an additional row being built? A. No.

Q. Where is your father buried?

A. Ka Seuk Leung.

Q. How far is that from your village?

A. About three or four lis away.

Q. Which way does your village face?

A. Southwest.

Q. Where is your house located?

A. Second house.

Q. In which row?

A. First row from the east.

Q. Where is the schoolhouse located?

A. On the east side.

Q. On the left or the right?

A. On the left.

Q. On your last trip to China what were your sons doing? A. Attending school.

Q. Were they all attending the same school?

A. Yes, sir.

Q. What was the name of the school?

A. Chan See Dai Dong; that is an ancestral hall.

[74]

Q. How far is that from your house?

A. About ten feet away.

Q. Do you know the name of the teacher at the time you were in China? A. Chan Kay Yuk.

Q. Was there any other teacher?

A. Chan Seow Fun.

Q. Which one of your boys did Chan Seow Fun teach?

A. Most every boy attends school at his place when they are young, and afterwards they go to Chan Kay Yuk's place.

Q. Did your boys ever attend any other school?

A. I don't know, but I don't think so.

Q. Is there anybody in the United States that knows your son Chin Hing?

A. Yes, Fong Goon Moon.

Q. When did he see your son?

A. When he went to China in S. T. 3d year, he took some money to my family for me.

Q. How much money did he take?

A. Thirty dollars.

Q. Did he take any letter? A. Yes, sir.

Q. When he returned to the United States did he say he had seen your sons? A. Yes.

Q. Where did he say he had seen them?

A. In my house.

Q. Did he bring any letter back to you?

A. Yes, he returned in the 2d year of the Republic and brought a letter.

Q. When you were in China last time, do you remember whether or not there was a flood? [75]

A. Yes.

Q. Did it flood your house? A. Yes.

Q. How high did it come up on the wall?

A. About eight feet.

Q. Do you remember any other incident that happened, such as robbery or fire, while you were in China? A. Yes, someone robbed us.

Q. How long had you been in China before you were robbed? A. About two months.

Q. Your son says it was two days.

A. I arrived in the 7th month and I was robbed in the 8th month.

Q. Did they steal anything?

A. What they stole was worth two or three hundred dollars.

Q. How long did the flood last?

A. I think five or six days.

Q. Do you recognize that photograph? (Photograph of applicant.)

A. That is my son, Chin Hing.

Q. What do you intend to do with him if he is admitted to the United States?

A. I will teach him business.

Witness signed stenographic notes in Chinese:

(Chinese Signature.)

Chinese and Immigrant Inspector. [76]

**[Examination of Fong Goon Moon at New York,
August 17, 1914.]**

Office Chinese Inspector, N. Y. City,
August 17, 1914.

In the Matter of CHIN HING, Applying for Admission at Seattle as the Minor Son of Chin Shew, Merchant and Member of the Firm of Quong Wo Chong & Co., 25 Pell St., New York City.

A. B. WILEY, Inspector.

LOUIS FONG, Interpreter.

F. J. MASTERSON, Stenographer.

Q. What is your name?

A. Fong Goon Moon (or Fong Yuen Mon.)
(Sworn.)

Q. What is your occupation?

A. Member of the firm of Quong Wee Wo & Co., 38 Mott St.

Q. Do you recognize that photograph? (Referring to photograph of alleged father of applicant.)

A. Yes, Chin Shew.

Q. How long have you known him?

A. Five or six years.

Q. Do you know what his home village was in China?

A. Chong On Village, Hoy Ping District.

Q. Do you remember whether or not he is mar-

ried? A. Yes, I know he is married.

Q. What is his wife's name?

A. I don't know what family she belongs to.

Q. Has she natural or bound feet?

A. Bound feet.

Q. Do you know whether or not he has any children? A. I know he has four sons.

Q. Do you know whether or not he has a daughter? A. I don't know.

Q. Did you ever see any of his family?

A. I saw his wife and his second son, Ching Hing, and third son, Chin Wai.

Q. Did you ever see the other two sons? [77]

A. No.

Q. How did you come to see his sons?

A. I went to China in S. T. 3d year and he gave me some money to take home to his family and I saw them there at that time.

Q. Did he give you any letter? A. Yes, sir.

Q. Did you go to Chin Shew's house, A. Yes.

Q. Did you go in? A. Yes.

Q. Did you have any meals in the house?

A. No, sir.

Q. How long did you stay?

A. About ten minutes.

Q. Did you sit down?

A. Just a little while.

Q. Did you have a cup of tea? A. Yes.

Q. How did you know where he lived?

A. I inquired and found his son.

Q. Where did you find his son?

A. In front of the ancestral hall.

Q. Which son was that you found?

A. Chin Hing.

Q. Did you bring any letter back to Chin Shew?

A. Yes, sir, before I returned I asked his son if he had any letter to bring back, and he gave me a letter.

Q. Did you make a second visit to the village on that occasion?

A. He gave me the letter at the market.

Q. What market was that? [78]

A. Hong How Kew.

Q. How long was that before you returned?

A. A few days.

Q. Upon what kind of papers did you depart from the United States on that trip?

A. Merchant's paper, member of the firm of Quong Yee Wo & Co.

Q. That is your paper, is it not?

A. Yes, that is my paper. (Referring to application paper showing that witness, under the name Fong Yuen Mon, departed from the United States via Vancouver about October or November, 1911, and returned to the United States via Vancouver December 6, 1912.)

(Chinese Signature.)

Witness signed stenographic notes:

ALBERT B. WILEY,

Chinese and Immigrant Inspector. [79]

**[Examination of Chin Wee Dong at New York,
August 17, 1914.]**

Office Chinese Inspector, N. Y. City,
August 17, 1914.

In the Matter of CHIN HING, Applying for Admission at Seattle as the Minor Son of Chin Shew, Merchant and Member of the Firm of Quong Wo Chong & Co., 25 Pell St., New York City.

A. B. WILEY, Inspector.

LOUIS FONG, Interpreter.

F. J. MASTERSON, Stenographer.

Q. What is your name?

A. Chin Wee Dong. (Sworn.)

Q. You were examined in this office in connection with the application of Hor Yin Yee to have his status determined as that of a merchant and member of the firm of Quong Wo Chong & Co. on July 15, 1914?

A. Yes, sir.

Q. At that time you filed a copartnership list of the members of the firm which I show you. (Showing copy of partnership list forwarded to Seattle office in connection with case of Hor Yin Yee.)

A. Yes, sir.

Q. Have there been any changes in the firm since that time?

A. No.

Q. Do you recognize that photograph? (Referring to photograph of alleged father of applicant.)

A. Chin Shew.

Q. Is he a member of your firm?

A. Yes.

Q. How much interest has he in the firm?

A. Two hundred dollars.

Q. When did he obtain his interest in the firm?

A. He invested one hundred dollars in S. T. 3d year, and then another hundred dollars last year.

Q. What is his position in the firm? [80]

A. Bookkeeper.

Q. During the past year has he given his entire time to his duties in that firm? A. Yes, sir.

Q. From whom do you buy your paper?

A. I know the person but I don't know his name.

Q. Do you know his first name? A. No.

Q. Did you ever hear of a person by the name of Harry W. Doremus?

A. I don't know his name but I know the person.

Q. Who do you buy your line from?

A. Mr. Hirsch.

Witness signed stenographic notes:

(Chinese signature.)

ALBERT B. WILEY,

Chinese and Immigrant Inspector. [81]

**[Examination of Joseph J. Hirsch at New York,
August 17, 1914.]**

Office Chinese Inspector, N. Y. City,
August 17, 1914.

In the Matter of CHIN HING, Applying for Admission at Seattle as the Minor Son of Chin Shew, Merchant and Member of the Firm of Quong Wo Chong & Co., 25 Pell St., New York City.

A. B. WILEY, Inspector.

F. J. MASTERSON, Stenographer.

Q. What is your name?

A. Joseph J. Hirsch. (Sworn.)

Q. What is your business, Mr. Hirsch?

A. Salesman for Chas. L. Hirsch & Co., grocery specialties.

Q. Do you recognize that photograph? (Referring to photograph of Chin Shew.)

A. Yes, Chin Shew.

Q. What is his occupation?

A. He is one of the proprietors at 25 Pell St., Quong Wo Chong & Co.

Q. How long have you known him in connection with that firm? A. Over two years.

Q. During the time that you have known him, have you ever had any business relations with him as a member of that firm? A. Yes, sir.

Q. What has been the nature of those relations?

A. He has paid me money.

Q. How often during the past year on an average have you visited that store? A. Once a week.

Q. Do you generally see this man in the store?

A. Yes, sir.

Q. What appear to be his duties?

A. He appears to be manager of the place, and the bookkeeper.

Q. Are you satisfied that during the past year he has performed no manual labor other than required of him as a merchant? A. Yes, sir. [82]

Q. He hasn't worked in a laundry or restaurant or anything of that sort during the year? A. No.

ALBERT B. WILEY,
Chinese and Immigrant Inspector.

[**Examination of Harry W. Doremus at New York,
August 18, 1914.**]

Office Chinese Inspector, N. Y. City.

August 18, 1914.

In the Matter of CHIN HING, Applying for Admission at Seattle as the Minor Son of Chin Shew, Alleged Merchant and Member of the Firm of Quong Wo Chong & Co., 25 Pell St., New York City.

H. R. Sisson,

Inspector and Stenographer.

Q. What is your name?

A. Harry W. Doremus. (Sworn.)

Q. What is your business?

A. Member of the firm of Chas. F. Hubbs & Co., 383 Lafayette St., dealers and manufacturers of paper and twines.

Q. Do you recognize that photograph? (Referring to photograph of Chin Shew.)

A. Yes, that is Chin Shew.

Q. What is his business?

A. He is a member of the firm of Quong Wo Chong & Co., 25 Pell St., dealers in Chinese general merchandise, etc. He is the bookkeeper and cashier.

Q. How long have you known him?

A. Three or four years.

Q. During the past year how frequently have you visited their place *place* of business?

A. An average of about once a week.

Q. Did you generally find this man in the store?

A. Yes.

Q. Have you ever had any business dealings with him in which he [83] represented the firm?

A. Yes, he has paid me bills and consulted relative to orders, etc. I know him well.

Q. Do you think it would have been possible for him to have performed any manual labor outside of that store during the past year without your having known it?

A. I don't think it would have been possible.

Q. You are satisfied he is a *bona fide* merchant?

A. Yes.

Chinese and Immigrant Inspector.

[Re-examination of Applicant at Seattle, Wash.,
August 26, 1914.]

Case of Chin Hing.

No. 31,992.

Seattle, Washington, August 26, 1914.

Inspector MANGELS,

Interpreter QUAN FOY.

Stenographer SEIDLE.

Re-examination of Applicant.

Q. You stated on your former examination that neither you nor any of your brothers had ever applied for admission to the United States; our records show that a man named Chin Quong applied here for admission as the son of Chin Sue, in 1912; do you not know anything about this?

A. Yes, Chin Quong was deported from this country about the 7th or 8th month Republic 1. You didn't ask me if my brothers had ever been in this country.

Q. How long have you known that you were born in K. S. 19, 11th month, 11th day?

A. My mother told me when I was a small boy.

Q. In what village did you say your mother's parents live?

A. Suey Mon village, but they are both dead now.

Q. Has that village another name? [84]

A. That is the only name I know.

Q. You stated on your former examination that they lived in Hoy Sin village.

A. I meant my father's mother came from Hoy Sin village.

Q. Has your father's father, San Jen, another name? A. Yes, his other name is Ah Deuk.

Q. Do you not know when he died?

A. I don't know; he died when I was a small boy.

Q. Tell me where in your village your house is located.

A. The second house, 1st lane, counting from the left side of the village. The village faces the west.

Q. Is the left side the east, west, north or south side of the village? A. It is the south side.

Q. On what side of the village is the schoolhouse located?

A. The left-hand side or south side of the village.

Q. When Fung Goon Moon returned to the United States, did he bring any message from your mother to your father? A. No.

Q. How do you know he didn't?

A. Because I know.

Q. How long did he stay in your house when he called there as you have stated?

A. Just a few minutes.

Q. Did he take tea? A. I don't remember.

Q. Did you ever see him at any other place than in your home village?

A. Yes, I met him in the Hong How market sometimes.

Q. Did you never give him any letter or message for your father when you met him at the market?

[85] A. Yes, I gave him a letter to my father.

Q. Why didn't you state this a moment ago when I asked whether any message was taken to your father? A. You didn't ask about myself.

Q. What did I ask you?

A. You didn't ask me in the previous examination.

Q. Didn't I ask you a few moments ago whether Fung Goon Moon had brought any messages from your mother to your father in this county?

A. Yes.

Q. Why didn't you tell me about sending a letter?

A. I misunderstood you.

Q. According to the testimony Ching Quong gave in May, 1912, at his office, your brothers would be 15 and 14 years old, respectively, instead of 14 and 13 years old, as you state; can you explain this difference?

A. One is 14 and one is 15 years old; I made a mistake. Chin Hoy is 14 and Chin Wae is 15 years old.

Q. Is that according to the Chinese count?

A. I don't know, all I know one is 14 and one is 15.

Q. From what village does your elder brother's wife come? A. I don't know.

Q. Do you know a person in your village named Yee Hing?

A. No, I don't know any name like that.

Q. Do you know where the Kah Low Ay hill is?

A. Yes, it is about four or five lees from my village.

Q. Do you know anybody that is buried there, or ever was buried there?

A. Yes, my father's father was buried in that place, but has been moved to the Kee Seuk Leung hill.

Q. Do you know a man who is now in this country named Quong Que, who visited China a few years ago? [86] A. No.

Q. Do you know who lives in the 1st house, 1st row in your village? A. Yee Hin lives there.

Q. I asked you before if you knew that man and you stated that you did not.

A. I thought you said Yee Hing.

Q. What family has he?

A. Two boys and three girls. The boys' names are Ah Fong a little over 20 years old and Ah Jow something over ten years old. The girls' names are Ah May, married, Ah Sue something over 10 years old and Ah Yung a few years old.

Q. When did your elder brother quit school?

A. I don't know how many years ago.

Q. Have you anything further to state?

A. No.

Q. Have you understood the interpreter well?

A. Yes.

Attest: F. O. SEIDLE,
Stenographer. [87]

[Report, August 27, 1914, of Inspector Mangels to
Commissioner of Immigration.]

No. 31,988.

August 27, 1914.

Commissioner of Immigration,
Seattle, Washington.

The case of Chin Hing, S. S. "Protesilaus," August 5, 1914, manifest #44, is that of an applicant seeking admission to the United States as the minor son of one Chin Shew, merchant, member of the Quong Wo Chong Co., 25 Pell Street, New York City, and is very similar to the case of Chin Quong (file 29,219) which was dismissed by the Department, June 11, 1912, the last-named applicant being an alleged brother of Chin Hing.

Besides the two sons named above, there are two others in China, aged respectively thirteen and fourteen years.

There are not *may* discrepancies in the testimony, and such as there are are not very serious. Attention may be called to certain dates given in the case, as they seem to be arranged in a way characteristic of many fraudulent cases:

Applicant born 11th month, 11th day.

Chin Quong born 12th month, 12th day.

Chan Wai born 5th month, 8th day.

Chan Hoy born 5th month, 18th day.

Chin Shew's mercantile status appears to be satisfactorily established at the present time.

Dr. Underwood believes applicant to be about twenty years old, and that is the age now claimed by him and his father. He is said to have been born on

a date corresponding to December 18, 1893, and will, therefore, in something less than four months be twenty-one years old, American. In view of Chin Hing's age, the evidence in the case should be most convincing. Should it be claimed that the applicant is entitled to admission as a minor required the care and protection of his father that claim would under any circumstances hold good for only about four months longer; but both the applicant and Chin Shew state that the young man is going to New York for the [88] purpose of joining the alleged father in business. Chin Quong also claimed the same thing, but it is stated now that he is doing nothing in China and that he is being supported by Chin Shew.

I beg to refer to pages 16 and 17 of the Chin Quong record as to former statements of Chin Shew concerning the ages of his sons.

The alleged father says that he first landed in this county in the first part of the seventh month of K. S. 19 (August, 1893), being admitted as a section 6 merchant, having come from Cuba where he had been but a few months. He says now that he thought the paper "was not very valuable so it has been mislaid," while in the Chin Quong case (page 14 of that record) he said in answer to a question as to what had become of that paper, "I destroyed it because I thought it wouldn't be of any use to keep it"—neither of which statements should, I submit, be credited. And Inspector Wiley states that a search of the custom house records covering admissions of Chinese at New York during the latter part of 1893

failed to disclose that anyone named Chin Shew *as* admitted there during the period mentioned.

The corroborating witness, Fong Goon Moon, is one of the usual type in cases similar to this. Applicant knows nothing concerning his family. Quong Kue, the corroborating witness in the Chin Quong case in 1912, does not appear as a witness in the present case, and applicant does not know him, though it appears that witness in his affidavit dated May 23, 1911, (file 29,219) swore that he was "personally and intimately acquainted with Chin Shew and his family," etc. However, it appears that he later modified that statement.

I do not think that the present applicant should be admitted.

(Signed) G. H. MANGELS,
Inspector. [89]

**[Examination of Applicant at Seattle, Wash.,
August 27, 1914.]**

Seattle, Wash., August 27, 1914.

Case of CHIN HING. #31,992.

G. H. MANGELS, Examiner and Reporter.

QUAN FOY, Interpreter.

Applicant testified:

INSPECTOR.—Q. Why are you coming to the United States?

APPLICANT.—A. To learn business with my father; he is in the drug business. (Exhibits envelope with the address of the alleged father, Quong Wo Chong Company, 25 Pell Street, New York, N. Y.)

Q. Who has been supporting you in China?

A. My father.

Q. Why,

A. Because I could not find anything to do in China.

Q. Who has been supporting your married brother and his family?

A. My father, because he had no business.

[**Examination of Chin Hing at Seattle, Wash.,
August 27, 1914.**]

Seattle, Wash., August 27, 1914.

Case No. 31,992.

HENRY A. MONROE, Examining Inspector.

QUAN FOY, Chinese Interpreter.

W. P. CALLAHAN, Stenographer.

CHIN HING, recalled.

Q. (By Mr. MONROE.) What is your name?

A. (By CHING HING.) Chin Hing.

Q. What is your wife's name?

A. Have no wife, I am not married

Q. How does it come that you should leave home without having taken a wife, as is the custom of your people?

A. Because I have no money to get married.

Q. Isn't your father a merchant in New York City?

[90] A. Yes.

Q. How does it come that he couldn't furnish you with the means necessary to your getting married?

A. I don't think he has much money himself.

Q. What do you intend to do in this county, if admitted? A. Stay in my father's business.

Q. Have you understood the interpreter at all times? A. Yes.

Q. Have you any further statement to make or additional evidence to present in support of your application? A. No.

Q. Not being satisfied that you are the minor son of a domiciled merchant, as claimed, you are denied admission. I now hand you form 429 which explains in Chinese characters the action being taken, and as well advises you of your right to an appeal from this decision if you feel aggrieved thereat; can you read this notice, and do you understand fully your rights at this time? A. I understand.

Q. You may communicate with your alleged father, counsel, and friends, of you desire?

A. I understand.

Q. Have you any local friend that you wished advised of your rejection?

A. My father has asked Chin Mon Doon, of the Quong Tuck Company, this city, to look after me, and I wish you would advise him.

A. This man will be advised at once of your rejection.

The following is a tracing of the applicant's signature as signed to stenographic notes:

(In Chinese.)

Certified a true transcript.

W. P. CALLAHAN,

Stenographer. [91]

Form 429

Notice to Rejected Chinese Applicant, Under Rule 5.

Department of Commerce and Labor.

Immigration Service.

Port of Seattle, Wash., August 27, 1914.

Chin Hing, #31,988.

You are hereby notified that your application for admission to the United States is denied. From this decision you have the right of appeal to the Secretary of Commerce and Labor. If you desire to appeal, you must notify the officer in charge at this port within two days of the receipt of this notice.

TRANSLATION.

(CHINESE CHARACTERS.)

HENRY M. WHITE,

Commissioner of Immigration.

H. A. M.

Ex. S. S. "Protesilaus," August 5, 1914. #44.
No. 31,992.

In the Matter of the Application of CHIN HING
for Admission to the United States as the
Minor Son of Chin Shew, a Domiciled Mer-
chant, of New York, N. Y.

Order Rejecting Applicant.

After duly considering the evidence, oral and documentary, introduced in the above-entitled matter, together with the reports of the investigating inspectors, and it not satisfactorily appearing [92] that the applicant is the minor son of a domiciled Chinese merchant, as claimed:

IT IS ORDERED that the said CHING HING

be and he is hereby rejected and denied admission to the United States.

FURTHER ORDERED that the said CHIN HING be returned to the country whence he came, to wit, China, by and at the expense of the steamship company bringing him to the United States.

Seattle, Washington, August 27, 1914.

(Signed) HENRY M. WHITE,
Commissioner.

[Telegram, September 2, 1914, Chin Shew to Henry White.]

WESTERN UNION DAY LETTER.

Always

Open

Received at 113 Cherry Street, Seattle, Washington.
W3065CH RM 21 BLUE MK

DUPLICATE OF TELEPHONED TELEGRAM.

TG New York Sept 2 1914

637

Hon Henry White

Commissioner of Immigration Seattle Wn I appeal from your decision on Chin Hing to Commissioner General kindly forward record to Washington for my attorney to receive.

CHIN SHEW.

1122AM.

Telephone No. ga 511.

Telephoned to Mr. Sargent.

Time 1126.

By E To be mailed.

U. S. Immigration Service. Received Sep. 3, 1914.
Seattle, Wash. [93]

[Notice from Commissioner-General to Commissioner of Immigration of Affirmance of Excluding Decision.]

U. S. Immigration Service. Sept. 25, 1914.

Received Sep. 30, 1914, Seattle, Wash.

Commissioner of Immigration,
Seattle, Wash.

Receipt is acknowledged of your letter of the 3d instant, No. 31,922, transmitting record on appeal in the case of Chin Hing.

After carefully considering the evidence presented in this case, the Acting Secretary has affirmed your excluding decision on the grounds that the mercantile status of the alleged father has not been satisfactorily established and the claimed relationship has not been reasonably shown to exist.

A. CAMINETTI,
CAS-C. Commissioner-General.
Incl. No. 1401. [94]

Digest of Evidence, Case of Chin Hing.

The applicant in this instance is almost a major, having been 20 years and 8 months old at time of arrival. Nevertheless, he seeks admission by virtue of his minority and the claimed status of his alleged father. The officials at New York and Seattle have conceded the mercantile status of the alleged father, Chin Shew, but the Bureau does not agree with them.

It appears that Chin Shew claimed he has a \$200 interest in the Quong Wo Chong Co., 25 Pell Street, New York City, and is employed there as bookkeeper. His assertions are corroborated by the testimony of

the manager of said firm and two white witnesses who deal with him in the store conducted by said firm. The officials in New York have known Chin Shew in connection with the business of Quong Wo Chong Co. Admitting the employment of Ching Shew in a mercantile establishment at a salary of \$30 or \$40 a month, it is not believed that his ownership of an interest of \$200 out of a total capitalization of \$11,000 (shown by a prior record, but not stated here) is sufficient to make him a merchant within the meaning of the law. It is also shown by the record that there are 14 active partners out of a total of 68, but the investigating officer failed to report whether they were all engaged in the store and whether the business was able to support that number of employees. Altogether, the Bureau cannot get away from the impression that Chin Shew's investment in this business was made and is retained for the sole purpose of securing a status that will enable him to bring "sons" to this country.

The evidence on the issue of relationship consists of the statements of Chin Shew, the applicant and a Chinese witness. The particular point urged against the proof by the Commissioner is that Chin Shew has failed to show he was in China at a time to [95] permit of his paternity of a son the age given for applicant. The unsatisfactory testimony of the applicant, though in agreement in most respects with that of the alleged father, and one serious discrepancy which has been overlooked at the port, constitute, in the Bureau's judgment, just as strong a ground for holding that the relationship has not

been reasonably established. The discrepancy is with respect to the paternal grandfather, applicant having stated, in effect, that this relative is dead and he has never seen him, while the alleged father said his father died at his home in 1900, which would be within the memory of applicant governing his presence in China *essential time*, the alleged father claimed he left his home in 1893, going to Havana, Cuba; and that he was admitted at New York about December, 1893, as a Section Six merchant. The arrival records fail to verify admission at New York. It is possible that Chin Shew entered this country in the manner claimed, although he has not given the correct date, intentionally or otherwise, but if he did he was not entitled to admission. The (cannot read) Department have seen a number of cases of Chinese who were permitted to go in transit through this country to Havana, Cuba, in the early nineties, and who later were erroneously permitted to enter this country from that place by virtue of Section Six certificates issued to them by the Chinese Consul there as merchants of some city in China, and vised by American consular officers without the investigation contemplated by the law having been made.

Local counsel, Corry M. Stadden, Esq., has requested re-examination of the New York records in an attempt to verify the landing of Chin Shew in December, 1893. He has given additional names by which this man might have been recorded. In view of what has been said hereinbefore as to the relationship and the mercantile status, there would be nothing gained by withholding decision for the result of another search of the records to show that Chin

Shew was admitted in December, 1893, or about that time, since that is [96] not a decisive factor in the case. The request has, accordingly, been denied.

BRIEF filed by counsel is next hereunder. His request that decision be withheld a few days for a report on a re-examination of the records of arrivals at New York should have been withdrawn by counsel in view of the Bureau's denial of his application for a re-examination of said records.

The statement he was not "permitted to see the Finding or Decree upon which the officers at the port denied admission," is intentionally erroneous. The Commissioner at Seattle designates his excluding decision "order rejecting applicant." Counsel was shown the order in this case on the basis of the Secretary's letter to him in the Yu Sher Suek case (53817/42). His attention was called to the erroneous nature of his statement, which he declined to change.

The rule of evidence which counsel cites to support his contention that the failure of the alleged father to prove his admission in December, 1893, does not affect the question of paternity, if applicable, would not help him in this instance. The alleged father, now having shown he entered this country from Cuba at the time stated, has not proven he was in China at the essential time to make access possible, so there is no presumption favorable to the claimed relationship.

The alleged father does assert he has been a merchant since entering this country in 1893. It is noted, however, that until about a year ago his inter-

est in the store where he is now employed is said to have been only \$100.

In re APPEAL; case of CHIN HING, alleged minor son of a domiciled Chinese merchant.

MEMORANDUM FOR THE ACTING SECRETARY. [97]

After carefully considering the evidence in this record, the Bureau concurs in the excluding decision rendered by the Commissioner at Seattle on the ground that the relationship claimed has not been shown to exist. It also believes that applicant should be denied because the mercantile status of the alleged father is not reasonably established.

It is recommended that the exclusion of applicant be ordered and his deportation directed.

(Sgd.) F. H. LARNED,
Acting Commissioner-General.

Approved.

(Sgd.) J. B. D.

Cas.

Sailing 28th inst.

Note local counsel, Corry M. Stadden, Esq., requests an opportunity to present an oral argument.

**[Letter, October 1, 1914, from Acting Commissioner-
General to Commissioner of Immigration.]**

U. S. DEPARTMENT OF LABOR,
BUREAU OF IMMIGRATION.
WASHINGTON.

In answering refer to
No. 53817/43.

October 1, 1914.

U. S. Immigration Service, Received
Oct. 6, 1914, Seattle, Washington.

Commissioner of Immigration,
Seattle, Washington.

Receipt is acknowledged of your telegram of the 30th ultimo, advising that petition for Writ of Habeas Corpus has been filed in the Chin Hing case (31922).

As this case was decided upon the record as submitted by you, and as you have been furnished a copy of the Bureau's memorandum which was approved by the Department, it is not considered necessary to forward you the record certified by the Department. You can use your own copy in making return to the writ. [98]

It is believed that the court will take the position that the decision having been rendered by Mr. Densmore as Acting Secretary, he will assume, in the absence of positive evidence to the contrary, that authority for him to act as such exists. See the following cases: Tang Tun v. Edsell, 223 U. S. 673, 682; Hannibal Bridge Company v. U. S., 221 U. S. 194, 206; Keyser v. Hitz, 133 U. S., 138, 145; in re Jem

Yuen, 188 Fed. 350, 354; and N. Y. and Md. R. R. Co. v. Winans, 17 How. (58 U. S.), 30 40. The provisions of the Revised Statutes which apply are found in Sections 177, 178 and 179.

F. H. LARNED,
Acting Commissioner-General.

CAS-s.

**[Notice, October 3, 1914, from Commissioner to
Dodwell & Co., Ltd.]**

No. 31,992.

October 3, 1914.

Messrs. Dodwell & Co., Ltd.,
Steamship Agents,
Seattle, Washington.

Sirs:

This is to inform you that Chin Hing, a Chinese who arrived at this port August 5, 1914, on the S. S. "Protesilaus," and who was ordered returned to the country whence he came by the Department, was not placed aboard the S. S. "Teucer" Tuesday evening, September 29th, as intended for the reason that Mr. John J. Sullivan, a lawyer of this city, secured a Writ of Habeas Corpus. Chin Hing is being detained here at the expense of his friends, the court requiring a deposit of \$100 to cover maintenance charges. On termination of the matter you will be advised of its import.

Respectfully,

HAM/WC.

Exact copy as signed by Henry M. White, Commissioner. Mailed Oct. 3, 1914. By C. [99]

[Endorsed]: Immigration File. Respondent's Exhibit "A." [100]

*In the United States District Court, in and for the
Western District of Washington, Northern
Division.*

No. 2857.

In the Matter of the Application of CHIN HING,
for a Writ of Habeas Corpus.

**Order [Extending Time to File Assignment of
Errors].**

The Court having been advised of the Stipulation agreed by and between the counsel for the petitioner and the counsel for the Government in the above-entitled cause, that the petitioner as appellant may have an additional ten (10) days, up to and including June ninth, in which to file his assignment of errors in an appeal from this Court's decision, and sufficient cause having been shown,

IT IS HEREBY ORDERED that the petitioner as appellant be, and is hereby allowed up to and including June ninth, 1915, in which to file said assignment of errors.

Done in open court this 1st day of June, 1915.

JEREMIAH NETERER.

[Endorsed]: Order. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 1, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [101]

*In the United States District Court, in and for the
Western District of Washington, Northern Divi-
sion.*

No. 2857.

In the Matter of the Application of CHING HING,
for a Writ of Habeas Corpus.

Petition for, and Order Allowing Appeal.

Ching Hing, petitioner in the above-entitled cause, by and through his attorney, John J. Sullivan, feeling himself aggrieved by the order and judgment remanding said petitioner to the custody of the Commissioner of Immigration, made and entered and filed on the 29 day of May, 1915, does hereby appeal from said order and judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that his appeal may be allowed, and that a transcript of the record and all proceedings and papers upon which said order and judgment were made and entered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Your petitioner respectfully prays that on account thereof this appeal be allowed to correct the errors complained of, and to reverse, annul and set aside the said order and judgment, made and entered in the premises on the 29 day of May, 1915.

Your petitioner further states that he will on or before the ninth day of June, 1915, file herein his assignment of errors alleged to have been committed in the above-entitled proceeding, and intended to be urged by your petitioner as appellant upon the prose-

cution of this suit upon appeal.

Your petitioner further prays that this appeal may be allowed, and that he be allowed to go on bail in the sum of One Thousand Five Hundred (\$1500.00) Dollars, with sureties to the satisfaction of the clerk of the above-entitled court, for his [103] appearance to answer the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, and to give himself into custody upon said order of said court.

Dated at Seattle, Washington, this 1st day of June, 1915.

CHIN HING.

JOHN J. SULLIVAN,

By Attorney for Petitioner, Ching Hing.

And now on the 1st day of June, 1915, the Court having heard the petition of Chin Hing, by and through his attorney, John J. Sullivan, and being full advised in the premises, it is ordered that the appeal prayed for in the foregoing petition be allowed, as prayed for by said petition by and through his Attorney, John J. Sullivan.

And it is further ordered, that the said petitioner, Chin Hing, may be enlarged pending the said appeal, upon executing a recognizance, with sureties, in the sum of One Thousand Five Hundred (\$1500.00) Dollars to the satisfaction of the clerk of the above-entitled court, O. K.'d by the United States Attorney, for his appearance to answer the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, and upon his failure to give bail, to remain in the custody of the Commissioner of Immigration at Seattle.

DONE in open court this 1st day of June, 1915.

JEREMIAH NETERER,
United States District Judge, Presiding in said Western District of Washington, Northern Division.

Received a copy of the within Petition and Order this 1st day of June, 1915.

CLAY ALLEN,

2. United States Attorney. [103]

[Indorsed]: Petition for and order allowing appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 1, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [104]

*In the United States District Court, in and for the
Western District of Washington, Northern Division.*

No. 2857.

In the Matter of the Application of CHIN HING,
for a writ of Habeas Corpus.

Bill of Exceptions.

BE IT REMEMBERED, that on the twenty-ninth day of September, 1914, came John J. Sullivan, as attorney for and in behalf of Chin Hing, an alleged alien, and an alleged son of a merchant of New York City, and appealed to the United States of America for a Writ of Habeas Corpus, on the ground of unlawful detention of said petitioner, and on the further ground that one J. B. Densmore, solicitor of the Department of Labor, acted without authority in ordering the deportation of said petitioner, and that in consequence he had been deprived of a fair hearing,

and that petitioner's appeal had been heard and determined by one not authorized to do so; to show cause an Order was issued from the United States District Court, in and for the Western District of Washington, Northern Division, and in due time the United States made a return from said Order and Petition for a Writ of Habeas Corpus, admitting and denying the allegations in said petition, and the United States further tendered and made a part of said return, an alleged original record, marked exhibit "A," as taken before the Immigration Department. A stipulation was entered into between counsel for the Government and counsel for the petitioner to the effect that interrogatories might be taken propounded to Louis F. Post, Assistant Secretary of Commerce and Labor, and Corrie M. Stadden of Washington, District of Columbia, before one Thomas G. Lewis, a Notary Public, which said interrogatories listed information from said Louis F. Post, and said Corrie M. Stadden as to whether or not said Louis F. Post was present in the city of Washington on the date that said J. B. Densmore acted and signed the Deportation Order, and reviewed the case of the said [105] petitioner, Chin Hing. The Order was signed by Honorable Jeremiah Neterer, Judge in and for the Western District of Washington, Northern Division, and upon the refusal of Louis F. Post to answer the interrogatories propounded by the said Commissioner appointed by order of the Court, a rule to show cause was issued by Justice Gould in the Supreme Court of the District of Columbia, and while said matter was

pending before said Court, counsel for the Government petitioned Honorable Jeremiah Neterer to issue an Order withdrawing said commission to take and propound interrogatories to said Louis F. Post. An answer was filed to said petition by counsel for the petitioner, Chin Hing, and hearing was had, on which said date the Court allowed the Government to make a further return, showing that the Secretary had reviewed the record and affirmed the decision of the Commissioner for the deportation of the petitioner, Chin Hing, and on the tenth day of May, 1915 the Court rendered an opinion granting the petition of the Government withdrawing said commission to take interrogatories, and on the twenty-ninth day of May, 1915, the Court signed a judgment and order in conformity with the said petition, discharging said Writ of Habeas Corpus, and remanding the petitioner to the custody of the Commissioner of Immigration. To all of which the petitioner excepted as herein set forth. Counsel asked the Court to rule:

I.

That the so-called memorandum for the Secretary, or Assistant Secretary, or Acting Secretary, as shown by the record, was irregular, illegal, and not given under oath, and its admission to the record sent up to the Department of Commerce and Labor, constituted illegality, and unfair hearing on appeal.

II.

That no other person except the Secretary of Commerce and Labor has a right to rule on appeal, as provided by the treaty, [106] laws and rules governing the admission of Chinese.

III.

That the petitioner had had no fair trial, in that letters, memorandums, etc., from officials and inspectors of the Department were considered by the Commissioner of Immigration without the petitioner being given a right to deny the same, or being apprised of their contents; that the same were not given under oath, and were not evidence, being hearsay, and not permissible under the rules governing the admission of Chinese.

IV.

That the evidence of so-called exhibit "A" disclosed such irregularity and illegality that the Court should investigate the record to do justice.

V.

That upon the evidence of this proceeding it appears from the record that the petitioner did not have a fair hearing, as he was entitled to upon application for admission into the United States under the law, constitution and treaty and rules and regulations of the United States governing the admission of Chinese, and his detention and deportation being illegal, he is now entitled to discharge.

VI.

Counsel asked the Court to rule that there was no evidence to justify the refusing of the United States, through its officials, to admit the petitioner from entering the United States, and no evidence to warrant finding that he was not the son of a Chinese merchant and resident of the United States, but the Court refused so to rule.

VII.

Counsel asked the Court to rule that inasmuch as the issue was before the Court as to whether or not J. B. Densmore acted with or without authority, the Court should determine that question and [107] not allow a return to be made on the day of the hearing, showing that the Secretary had examined the original record, when, according to said first return, as shown by the record, this Court was presumed to have the record before him, and made a part of said return, but the Court refused so to rule.

VIII.

Counsel asked the Court to rule that inasmuch as Justice Gould had decided that Louis F. Post, Assistant Secretary, should answer the interrogatories as to whether or not he was in Washington at the time the appeal of the petitioner was heard, and Order of Deportation signed by J. B. Densmore, the Court should not grant the petition of the Government, and admit the return offered on the day of the hearing, but should allow the interrogatories to be propounded and determine the question upon the issues which had already been made, to wit: whether or not J. B. Densmore acted with authority in deciding the appeal and ordering the deportation of Chin Hing, but the Court refused so to rule.

IX.

That upon the law and the evidence the petitioner is illegally restrained and detained, and was not given a fair hearing, either before the Commissioner of Immigration at Seattle, Washington, or on appeal, and his Order of Deportation was signed by one acting without authority; therefore, the petitioner

ought to be discharged from custody, but the Court refused so to rule; and ordered that the Writ of Habeas Corpus heretofore issued, be discharged, and that the petition of the Government to withdraw the interrogatories heretofore stipulated, be withdrawn and the petitioner, Chin Hing, be remanded to the custody of the Commissioner of Immigration; and to said rulings and refusal to rule, and to said Order and Judgment of the Court, counsel for petitioner duly excepted and said exceptions were allowed by the Court; the Court having filed an Opinion which is included [108] in the transcript of the record in this case, and is made a part thereof. The petitioner later appealed from said decision and order of the Court entered on the twenty-ninth day of May, 1915, to the Circuit Court of Appeals in and for the Ninth Circuit, and filed a petition for appeal, and Assignment of Errors, and said appeal was allowed, and Citation issued, as appears by the record.

Thereupon, petitioner, Chin Hing, tenders this, his Bill of Exceptions to the actions, rulings and judgment of the Court, and the refusals to rule in the particulars set out, to have the same force and effect as if each and every said exception had been separately signed and sealed, which were signed and made a part of the record in this case.

Dated this 9th day of June, 1915.

CHIN HING,

Petitioner.

By JOHN J. SULLIVAN,

His Attorney and Solicitor.

O. K.—G. P. FISHBURNE,

Asst. U. S. Atty.

[Order Allowing Bill of Exceptions.]

Allowed.

JEREMIAH NETERER,

Judge.

Copy of within Bill of Exceptions received and due service of same acknowledged this 9th day of June, 1915.

WINTER S. MARTIN,

Asst. Attorney for U. S.

[Indorsed]: Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 30, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [109]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2857.

In the Matter of the Application of CHIN HING
for a Writ of Habeas Corpus.

Bail Bond.

WHEREAS, CHIN HING, by and through his attorney, John J. Sullivan, filed an application in the above-entitled Court for a Writ of Habeas Corpus, which said Writ was after hearing, discharged by the Honorable Jeremiah Neterer, Judge in and for the Western District of Washington, Northern Division, and said petitioner remanded to the custody of the United States Commissioner of Immigration; and

WHEREAS, the said petitioner, Chin Hing, by and through his Attorney, John J. Sullivan, has appealed from said Order and Judgment entered on the 29th day of May, 1915, to the Circuit Court of Appeals for the Ninth Circuit; and

WHEREAS, pending said appeal the above-entitled Court has required the said petitioner, Chin Hing to be enlarged upon furnishing a bail bond in the sum of one thousand five hundred (\$1,500.00) dollars, with sufficient sureties for the appearance of said Chin Hing in the above-entitled court, in case said Decree and Order and Judgment be affirmed.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS: That we, Chin Hing, as principal, by and through his attorney, John J. Sullivan, and National Surety Company, a corporation, as sureties, are held and firmly bound unto the United States in the penal sum of one thousand five hundred (\$1,500.00) dollars, for the payment of which well and truly to be made they bind themselves, their heirs executors, administrators and assigns, jointly and severally, by these presents. [110]

Sealed with their seals and dated this 1st day of June, 1915.

The condition of the above obligation is such that if the above-mentioned Chin Hing shall at all times render himself amenable to the orders and processes of the above-entitled Court, in case said Decree of the above-entitled Court be affirmed by the Circuit Court of Appeals of the Ninth Circuit, and will appear for judgment in case it be ultimately determined that the said petitioner is not entitled to a Writ of Habeas

Corpus, and is remanded to the custody of the Commissioner of Immigration at Seattle, Washington, then this obligation to be void; otherwise to remain in full force and effect.

CHIN HING.

By JOHN J. SULLIVAN,

Attorney for Petitioner Chin Hing.

[Seal] NATIONAL SURETY COMPANY,

By GEO W. ALLEN,

Attorney in Fact.

O. K.—ALLEN, U. S. Atty.

Approved:

JEREMIAH NETERER,

Judge.

[Indorsed]: Bail Bond. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 5, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [111]

*In the United States District Court, in and for the
Western District of Washington, Northern Di-
vision.*

No. 2857.

In the Matter of the Application of CHIN HING,
for a Writ of Habeas Corpus.

**Stipulation [Extending Time to File Assignment of
Errors].**

IT IS HEREBY STIPULATED AND
AGREED by and between the counsel for the peti-
tioner, Chin Hing, and the counsel for the respond-
ent in the above-entitled cause, that the petitioner as

appellant may have an additional ten (10) days up to and including June ninth, in which to file his assignment of errors alleged to have been committed in the above-entitled proceeding, and intended to be urged by the petitioner as appellant upon the prosecution of this suit upon appeal to the Circuit Court of Appeals for the Ninth Circuit.

Dated this 7th day of June, 1915.

CLAY ALLEN and
GEO. P. FISHBURNE,
Attorneys for United States Government.
BEELER & SULLIVAN,
Attorneys for Petitioner, Chin Hing.

[Indorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. June 9, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [112]

*In the United States District Court, in and for the
Western District of Washington, Northern Division.*

No. 2857.

In the Matter of the Application of CHIN HING,
for a Writ of Habeas Corpus.

Assignment of Errors.

Comes now John J. Sullivan, and as attorney for the petitioner and appellant in the above-entitled cause, says: That in the record and proceeding in this case, and in the Order and Judgment entered on the twenty-ninth day of May, 1915, there is manifest error in this, to wit:

I.

That the Court erred in refusing to grant the Writ of Habeas Corpus, and discharge the petitioner.

II.

That the Court erred in admitting as evidence the so-called record marked exhibit "A" without further proof than the certificate thereunto appended.

III.

That the Court erred in ruling that the so-called record marked exhibit "A" was to the effect that Chin Hing had been granted a full and fair hearing on his application to land in the United States.

IV.

That the Court erred in ruling that the so-called record marked exhibit "A" proved that the petitioner had been accorded the right to appeal from the excluding decision, and that said appeal had been heard and decided in a fair and legal manner, in accordance with the rules and regulations governing the admission of Chinese into the United States.

V.

That the Court erred in overruling counsel for petitioner [113] that inasmuch as said so-called exhibit "A" contained no written decision or order signed by the Secretary of Commerce and Labor, it did not appear therefrom that the appeal had been duly acted upon by the United States.

VI.

That the Court erred in ruling that the so-called exhibit "A" proved that a proper record on appeal had been submitted to, and acted upon by the officers authorized by law to act, under and by virtue of the

rules and regulations governing admission of Chinese into the United States, and the right to appeal from an adverse decision by the Commissioners at the port of entry.

VII.

That the Court erred in refusing to rule as requested by counsel for petitioner, that the memorandum for the Acting Secretary, included in said record, was an irregular, improper, and illegal addition to the record made by the Commissioner-General of Immigration, or under his authority, and was not evidence, was not given under oath as shown by the record, and should not have been made a part of the record, or admissible.

VIII.

That the Court erred in ruling that the so-called record marked exhibit "A," conclusively proved that the petitioner had been accorded a fair hearing, both at the port of entry and on appeal, in accordance with the law and treaty between the United States and China, and rules and regulations governing the admission of Chinese, and that there was evidence to substantiate the findings of the Department.

IX.

That the Court erred in refusing to rule that no one but the Secretary of Commerce and Labor has a right to affirm an excluding decision. [114]

X.

That the Court erred in refusing to rule that there was nothing in the record to show that the Acting Secretary had been authorized to act.

XI.

That the Court erred in refusing to rule that the record showed such unfairness and illegality as to warrant the Court to investigate the status, or dispose of the case as law and justice required, omitting therefrom such evidence as should not have been admissible.

XII.

That the Court erred in not finding that the petitioner was the son of a merchant of New York City.

XIII.

That the Court erred in granting the Petition of the Government to withdraw commission to take interrogatories of Louis F. Post, Assistant Secretary, heretofore granted by the Court.

XIV.

That the Court erred in granting the Petition of the Government to withdraw commission to take interrogatories, after the same had been stipulated, and upon refusal of said Louis F. Post to answer and rule to show cause had been issued by Justice Gould, an Order was entered by said Justice Gould commanding said Louis F. Post to answer same, and upon said answer to said interrogatories depended the determination as to whether the petitioner had been ordered deported without authority, and the Court should have allowed said matter to be determined as the issue had been made up.

XV.

That the Court erred in allowing a copy of said record taken at said hearing before the Immigration Department to be termed the "original record"

in this case, as shown by the first return. [115]

XVI.

That the Court erred in allowing a further return on the day of hearing by the Government, showing that the Secretary had examined the original record, when by the first return, the original record was alleged to be before the Court, and no Order had been issued by this court allowing same to be taken from the files of the court.

XVII.

That the Court erred in withdrawing the commission to take interrogatories and allow an alleged finding of the Secretary of Commerce and Labor to be offered in evidence, after the said cause between the petitioner and the Government was at issue.

XVIII.

That the Court erred in not holding that by the record in the cause, the burden of proof was upon the Government to show that J. B. Densmore acted with authority.

XIX.

That the Court erred in not finding that the petitioner should have had notice that the appeal would be heard by the Secretary of Commerce and Labor, after this case was before the Court, and that permission should be given counsel to present a brief, or oral argument, or both before said Secretary; and that said alleged hearing under said circumstances without Order of the Court when this case was before the Court and issues made up, was irregular, illegal, and unfair, and the Court should not have admitted the finding and return as made on the day of hearing,

as shown by the record.

XX.

That the Court erred in rendering a Decree and Judgment, discharging the Writ of Habeas Corpus, and remanding the petitioner to the custody of the officers of the United States, and depriving him of his liberty. [116]

XXI.

That said Order entered on the twenty-ninth day of May, 1915, is not warranted by, nor supported by the facts of the law in the premises, but is contrary thereto.

WHEREFORE, said Chin Hing, the petitioner and appellant herein, by and through his attorney, John J. Sullivan, prays that his Assignment of Errors be entered upon the record in this case, and that upon the hearing of this appeal it may be adjudged by the United States Circuit Court of Appeals for the Ninth Circuit, and that the Order and Judgment on the twenty-ninth day of May, 1915, made and entered, be in all things reversed, set aside and held for naught, and that it be adjudged and decreed that the petitioner and appellant have an adjudication in his favor, as prayed for in said amended petition.

CHIN HING,
Petitioner.

By and Through JOHN J. SULLIVAN,
His Attorney and Solicitor.

[Indorsed]: Assignment of Errors. Filed in the
U. S. District Court, Western Dist. of Washington,

Northern Division. June 10, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [117]

*In the United States District Court, in and for the
Western District of Washington, Northern Division.*

No. 2857.

In the Matter of the Application of CHIN HING,
for a Writ of Habeas Corpus.

Citation (Copy).

To HENRY M. WHITE, Commissioner of Immigration, and CLAY ALLEN and GEORGE P. FISHBURNE, United States Attorney and Assistant United States Attorney, His Attorneys,
Greeting:

You and each of you are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, in the State of California, within thirty (30) days from the date of this citation, pursuant to an appeal filed in the clerk's office of the United States District Court for the Western District of Washington, Northern Division, in a proceeding therein entitled—"In the Matter of the Application of Chin Hing, for a Writ of Habeas Corpus," numbered 2875, and show cause, if any there be, why the order and judgment of the United States District Court for the Western District of Washington, Northern Division, in said appeal mentioned, should not be reversed, set aside and held for naught, and why speedy justice should not be done in that behalf.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this 1st day of June, 1915.

[Seal] JEREMIAH NETERER,
United States District Judge, Presiding in said
Western District of Washington, Northern Division. [118]

Copy of within Citation received and due service of same acknowledged this 1st day of June, 1915.

CLAY ALLEN,
Attorney for Respondent.

[Indorsed]: No. 2857. Original. In the District Court in and for the Western District of Washington, Northern Division. In the Matter of the Application of Chin Hing, for a Writ of Habeas Corpus. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 1, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. Beeler & Sullivan, Lawyers, 510-11 White Building, Seattle, Wash. [119]

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

No. 2857.

In the Matter of the Application of CHIN HING,
for a Writ of Habeas Corpus.

**Stipulation [Allowing U. S. Government 60 Days to
File Such Papers as They may See Fit, to be a
Part of Transcript of Record, etc].**

IT IS HEREBY AGREED AND STIPULATED
by and between Beeler & Sullivan, attorneys for

Petitioner, Chin Hing, and Clay Allen and George P. Fishburne, attorneys for the United States Government, that the United States Government may have a period of sixty (60) days within which to file such papers as they may see fit, to be a part of the transcript of record in the above-entitled case, and the clerk of the United States District Court, in and for the Western District of Washington, Northern Division, may have sixty (60) days from the time allowed by law, within which to certify the transcript in the above-entitled case to the above-named court.

Dated this fourteenth day of June, 1915.

CLAY ALLEN,

GEORGE P. FISHBURNE,

Attorneys for United States Government.

BEELER & SULLIVAN,

Attorneys for Petitioner, Chin Hing.

Approved:

JEREMIAH NETERER,

Judge. [120]

[Indorsed]: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 18, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [121]

*In the United States District Court, in and for the
Western District of Washington, Northern Divi-
sion.*

No. 2857.

In the Matter of the Application of CHING HING,
for a Writ of Habeas Corpus.

Praeipie (for Certified Copy of Citation).

To the Clerk of the Above-entitled Court:

You will pleas issue one certified copy of the Cita-
tion in the above-entitled cause, and hand same to
the marshal for service.

JOHN J. SULLIVAN,

Attorney for Petitioner, Ching Hing. [122]

*In the United States District Court, in and for the
Western District of Washington, Northern Divi-
sion.*

No. 2857.

In the Matter of the Application of CHIN HING
for a Writ of Habeas Corpus.

Praeipie [for Record].

To the Clerk of the Above-entitled Court:

You will please prepare transcript of record in
the above-entitled cause on appeal, and file same in
the Circuit Court of Appeals, omitting therefrom the
briefs of both counsel, original petition, as a further
amended petition was filed by leave of court, con-
taining an allegation of all the facts relied upon
and Ex. "A" except pages 8, 9, 31, 32, 33, 35, 36, 37,

38, 39, 40, 45, 46, 47 and 58.

JOHN J. SULLIVAN,
Attorney for Petitioner.

[Indorsed]: Praeceptum (for Certified Copy of Citation). Praeceptum (for Record). Filed in the U. S. District Court, Western District of Washington, Northern Division, June 1, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

**[Waiver of Provisions of Act of February 13, 1911,
etc.]**

We waive the provisions of the Act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Appeals for printing as provided under Rule 105 of this Court.

BEELER & SULLIVAN,
Attorneys for Petitioner. [123]

United States District Court for the Western District of Washington.

No. 2857.

In re Application of CHIN HING, for a Writ of Habeas Corpus.

Praeceptum [of U. S. Attorney].

To the Clerk of the Above-entitled Court:

You will please add Original Petition, Opinion of Judge Jeremiah Neterer and the parts of the exhibits marked "Use."

CLAY ALLEN,
U. S. Attorney.
By G. P. FISHBURNE,
Assistant U. S. Attorney.

[Indorsed]: Praeceptum for Process, etc. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. June 30, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [124]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 2857.

In the Matter of the Application of CHIN HING,
for a Writ of Habeas Corpus.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing 124 typewritten pages numbered from 1 to 124, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as are necessary to the hearing of said cause in the United States Circuit Court of Appeals for the Ninth Circuit, and as is called for by counsel of record herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitutes the record on appeal to the said Circuit Court of Appeals for the Ninth Circuit from the District Court of the United States for the Western District of Washington.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of counsel for petitioner, for making record, certificate or return, to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [125]

Clerk's fee (Sec. 828, R. S. U. S.), for making record, certificate or re- turn, 244 folios at 15c.....	\$36.60
Certificate of clerk to transcript of record, four folios at 15c.....	.60
Seal to said Certificate.....	.20
	<hr/>
Total.....	\$37.40

I hereby certify that the above cost for preparing and certifying record amounting to \$37.40, has been paid to me by Messrs. Beeler & Sullivan, counsel for petitioner.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at Seattle, in said District, this 26th day of August, 1915.

[Seal]

FRANK L. CROSBY,
Clerk U. S. District Court. [126]

*In the United States District Court, in and for the
Western District of Washington, Northern Di-
vision.*

No. 2857.

In the Matter of the Application of CHIN HING,
for a Writ of Habeas Corpus.

Citation [Original].

To Henry M. White, Commissioner of Immigration,
and Clay Allen and George P. Fishburne,
United States Attorney and Assistant United
States Attorney, His Attorneys, Greeting:

You and each of you are hereby cited and admon-
ished to be and appear before the United States Cir-
cuit Court of Appeals for the Ninth Circuit at the
City of San Francisco, in the State of California,
within thirty (30) days from the date of this cita-
tion, pursuant to an appeal filed in the clerk's office
of the United States District Court for the Western
District of Washington, Northern Division, in a pro-
ceeding therein entitled, "In the Matter of the Ap-
plication of Chin Hing, for a Writ of Habeas Cor-
pus," numbered 2857, and show cause, if any there
be, why the order and judgment of the United States
District Court for the Western District of Wash-
ington, Northern Division, in said appeal mentioned,
should not be reversed, set aside and held for naught,
and why speedy justice should not be done in that
behalf.

Witness, the Honorable EDWARD DOUGLAS
WHITE, Chief Justice of the Supreme Court of

the United States, this 1st day of June, 1915.

[Seal]

JEREMIAH NETERER,

United States District Judge, Presiding in Said
Western District of Washington, Northern Division. [127]

[Endorsed]: No. 2857. Original. In the U. S. District Court, in and for the Western District of Washington, Northern Division. In the Matter of the Application of Chin Hing, for a Writ of Habeas Corpus. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jun. 1, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

Copy of within Citation received and due service of same acknowledged this 1st day of June, 1915.

CLAY ALLEN,

Attorney for Respondent.

[Endorsed]: No. 2651. United States Circuit Court of Appeals for the Ninth Circuit. Chin Hing, Appellant, vs. Henry M. White, as Commissioner of Immigration at the Port of Seattle, Washington, for the United States Government, Appellee. In the Matter of the Application of Chin Hing for a Writ of Habeas Corpus. Transcript of Record. Upon Appeal from the United States District Court for

the Western District of Washington, Northern Division.

Received August 30, 1915.

F. D. MONCKTON,

Clerk.

Filed September 13, 1915.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

IN THE

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**United States Circuit Court
of Appeals**

FOR THE NINTH CIRCUIT

CHIN HING,

Appellant,

vs.

HENRY M. WHITE, as Commis-
sioner of Immigration at the Port
of Seattle Washington, for the
United States Government,

Appellee.

No. 2651

In the Matter of the Application of CHIN HING,
for a Writ of Habeas Corpus.

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HON. JEREMIAH NETERER, *Judge.*

Brief of Appellant

JOHN J. SULLIVAN,
Attorney for Appellant.

510-11 White Bldg., Seattle, Wash.

IN THE
**United States Circuit Court
of Appeals**

FOR THE NINTH CIRCUIT

CHIN HING,

Appellant,

vs.

HENRY M. WHITE, as Commis-
sioner of Immigration at the Port
of Seattle Washington, for the
United States Government,

Appellee.

No. 2651

In the Matter of the Application of CHIN HING,
for a Writ of Habeas Corpus.

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HON. JEREMIAH NETERER, *Judge.*

Brief of Appellant

STATEMENT OF THE CASE.

Appellant, Chin, Hing, a Chinese person, seeks
admission to the United States as a minor son of a

merchant, Chin Shew. He was denied admission after a hearing by the appellee, Commissioner of Immigration at Seattle, Washington (Record p. 94). An appeal from the order of rejection was taken to the Secretary of Commerce and Labor of the United States at Washington, D. C., (Record p. 95), and after consideration the appeal was dismissed and the order of rejection affirmed by J. B. Densmore, the solicitor of the Department of Labor, assuming authority as Acting Secretary (Record pages 96 and 100). While being detained at Seattle, Washington, his port of entry, awaiting deportation, the appellant filed a petition in the United States District Court, for the Western District of Washington, Northern Division, praying for a writ of habeas corpus (Record pages 2 and 15), alleging in substance that he arrived at the port of Seattle on the 5th day of August, 1914, and applied for admission; that he was given a hearing and examined before the Immigration officers on the 27th day of August, 1914; an order was issued by the Commissioner of Immigration, at Seattle, Washington, denying admission, and ordering his deportation; that an appeal was prosecuted to the Secretary of Labor, and on September 26th, 1914, the

order of deportation was affirmed by one, J. B. Densmore, the solicitor of the Department of Labor, and not by the Secretary of Labor, or the Assistant Secretary of Labor, each of whom at the time of the determination of said appeal, was at his respective office in the City of Washington, and that the determination of this appeal by another, not authorized, is not a fair hearing, and does not accord to him due process of law.

II.

Petitioner further stated that he had not had a fair and impartial trial before the Inspector in charge of Immigration at Seattle, Washington; that there is no evidence in the records to sustain the Department's Exclusion and Deportation Order; that he was not allowed to have his counsel appear before the Commissioner General of Immigration, or the lawful Acting Secretary of Labor after said petitioner, Chin Hing, had appealed from said illegal act of said solicitor, J. B. Densmore, or after said appeal had reached the Department of Labor, in order that said counsel might present the case to the said Commissioner-General of Immigration, or the lawful Acting Secretary of Labor, and bring

to the attention of said officials the said illegal act of said solicitor, J. B. Densmore, and place certain evidence before said officials which would warrant a reversal of said Order of Exclusion and Deportation, or would warrant their consideration of the appeal of the petitioner.

III.

Petitioner further stated that he had not been accorded the rights or privileges allowed by the Constitution of the United States, and by the treaty between the United States and China, and prayed that he be discharged.

IV.

The writ was issued and return made by the Commissioner of Immigration, denying that appellant was not given a fair trial, or deprived of any of his rights, and petitioner affirmatively stating, among other things, that said appellant had his appeal considered by the Secretary of the Department of Labor, in the manner provided by law; that the record and decision and exhibits, both on the hearing before the said Commissioner, and on appeal

to the Secretary, was thereto attached and marked "Exhibit A," and made a part of said return, and praying that he be remanded (Record page 12). Upon the return day it was stipulated between counsel for the Government and counsel for the appellant that the depositions of Louis F. Post, Assistant Secretary of the Department of Labor, and Corry M. Stadden, both of Washington, D. C., should be taken before Thomas D. Lewis, Notary Public of Washington, D. C. who was appointed by the honorable court to take the depositions of the witnesses named. The witness, Louis F. Post, the Assistant Secretary, declined to testify, because his answer might be prejudicial to the public interest; and a rule was issued by Justice Gould, of the Supreme Court of the District of Columbia, returnable November 14th, 1914, directed to Louis F. Post, Assistant Secretary of Labor, requiring him to show cause why he should not answer certain questions propounded to him pursuant to said commission and stipulation (Record page 27). Whereupon the said Honorable Justice Gould, upon the matter coming up for hearing, after considerable delay, due to the solicitation of the Government, to postpone the hearing from time to time, rend-

ered a decision requiring said Louis F. Post to answer (Record page 31).

On the 5th day of April, 1915, a petition was filed by the Assistant United States Attorney requesting that the order entered pursuant to the stipulation of the 20th day of October, 1914, for the taking of the testimony of Louis F. Post, Assistant Secretary of Labor, be recalled, for the reason that on the 13th day of November, 1914, the Secretary of Labor had personally reviewed the record and affirmed the decision of the Commissioner of Immigration (Record page 32). Therefore, the court did, on the 11th day of May, 1915, render an opinion, recalling the Commissioner to take the depositions. The writ was discharged and the petitioner was remanded to the custody of the Department of Immigration (Record page 43), and an Order was so issued (Record page 44). To the entry of the above Order the petitioner excepted, which exception was allowed.

From this Order this appeal is taken. The appellant is now at large on bail.

ASSIGNMENT OF ERRORS.

Thereafter Bill of Exceptions were allowed (Record, pages 106-112), and Assignment of Errors were filed (Record, pages 115-120), which will be considered under the following:

I.

I will not take up space in this brief to repeat the Bill of Exceptions and Assignment of Errors, as shown in the record, but will take up those that I deem important which cover the alleged error set out, and the others herein omitted.

First: That the court erred in granting the petition of the Government to withdraw commission to take interrogatories, after the same had been stipulated, and upon refusal of the said Louis F. Post to answer, and rule to show cause had been issued by Justice Gould, an order was entered by said Justice Gould commanding said Louis F. Post, to answer same, and upon said answer to said interrogatories depended the determination as to whether the petitioner has been ordered deported without authority, and the court should have allowed said matter to be determined as the issue had been made up (Assignment XIV, Record, p. 118).

Second: That the court erred in allowing a further return on the day of hearing by the Government, showing that the Secretary had examined the original record, when by the first return, the original record was alleged to be before the court, and no order had been issued by this court allowing same to be taken from the files of the court (Assignment XVI, Record, p. 119).

Third: That the court erred in withdrawing the commission to take interrogatories and allow an alleged finding of the Secretary of Commerce and Labor to be offered in evidence, after the said cause between the petitioner and the Government was at issue (Assignment XVII, Record, p. 119).

Fourth: That the court erred in not holding that by the record in the cause, the burden of proof was upon the Government to show that J. B. Densmore acted with authority, (Assignment XVIII, Record, p. 119).

Fifth: That the court erred in not finding that the petitioner should have had notice that the appeal would be heard by the Secretary of Commerce and Labor, after this case was before the court, and that permission should be given counsel to present a brief, or oral argument, or both before the said

Secretary; and that said alleged hearing under said circumstances without order of the court when this case was before the court and issues made up, was irregular, illegal and unfair, and the court should not have admitted the finding and return as made on the day of hearing, as shown by the record. Assignment XIX, Record, p. 119.)

Sixth: That the Court erred in refusing to rule as requested by counsel for petitioner, that the memorandum for the Acting Secretary, included in said record, was an irregular, improper, and illegal addition to the record made by the Commissioner General of Immigration, or under his authority, and was not evidence, was not given under oath as shown by the record, and should not have been made a part of the record, or admissible.

Seventh: That the court erred in ruling that the so-called record marked exhibit "A," conclusively proved that the petitioner had been accorded a fair hearing, both at the port of entry and on appeal, in accordance with the law and treaty between the United States and China, and rules and regulations governing the admission of Chinese, and that there was evidence to substantiate the findings of the Department.

ARGUMENT

It seems to me that when the writ of habeas corpus was issued, the issue was then raised before the Honorable Judge Neterer, and the only one which he should pass upon was the legality of the detention, under the alleged authority of J. B. Densmore, and the question as to whether or not the petitioner, Chin Hing, had been given a fair and impartial hearing before the Immigration authorities as disclosed by the record then before the court, on the issues made up. A question of fact was then presented upon said issue: Was the Assistant Secretary of Labor, or the Secretary of Labor, or either, present and on duty in the Department of Labor on the day said order of exclusion was signed by the said J. B. Densmore? There is a very clear and well defined distinction between the duties and responsibilities of a Public Ministerial Officer and of one who performs executive functions, as an agent of the President. It may be said of the Secretary of Labor or whoever acts in his stead as was said of the Secretary of State, who is charged with the conduct of secret correspondence with foreign nations, in the leading case of *Marbury vs. Madison*, 1 Cranch, 137, 138:

“His duties are of two kinds and he exercises his functions in *two distinct capacities* as a *public ministerial officer* of the United States, and as an *agent of the President*. In the *first his duty is to the United States, or its citizens*; in the other his duty is to the President; in the one he is an *independent* and an *accountable* officer; in the other he is dependant on the President, is his agent and is accountable to him alone. In the former he is *compellable* by mandamus to do his duty; in the latter he is not.”

This distinction is clearly pointed out in the Acts of Congress creating the Department of Labor and restricting Chinese Immigration, or immigration in general. In the Act of March 4, 1913, creating the Department of Labor (37 U. S. Stat. at Large, Chap. 141), the Secretary of Labor is charged with certain executive duties, as making “such special investigations and reports as he may be required to do by the President,” around which the veil of secrecy and of privilege may be thrown; and also with other ministerial duties as to making “investigations and reports” as may be required “by Congress” as to which here is no secrecy, or privilege unless Congress shall by specific act so provide. Section 2, in part provides as follows:

“That there shall be in said department an Assistant Secretary of Labor, to be appointed by the President, who shall receive a salary of five thousand dollars a year. He shall perform such duties as shall be prescribed by the Secretary or *required by law*.”

The Assistant Secretary, therefore, performs both executive and ministerial duties. And by virtue of Section 177 of the Revised Statutes, of the U. S., which says:

“In the case of the death, resignation, absence or sickness of the head of any department, the *first* or *sole assistant* thereof shall, unless otherwise directed by the President, as provided by section one hundred and seventy-nine, perform the duties of such head until a successor is appointed, or such absence or sickness shall cease.”

he becomes the head of the Department in the absence of the Secretary of Labor. The Assistant Secretary of Labor, therefore as such acts in a subordinate capacity; but in the absence of the Secretary he at once, and automatically, assumes all of the duties and responsibilities of the head of the Department, which none other, unless otherwise authorized by the President according to law,

can exercise or assume, in whole or in part, during said absence.

By the Acts of February 14, 1903, (32 Stat. p. 828), and of March 4, 1914 (37 Stat. c. 141), the authority and power with respect to the enforcement of the Chinese exclusion laws, theretofore vested in the Secretary of the Treasury, have been transferred to the Secretary of Labor. By Section 8, of the Act of September 13, 1888 (25 Stat. 476), known as the "Exclusion" law, he is authorized and empowered to make or amend regulations to secure to the Chinese the rights provided for in subsisting treaties between the United States and China. This authority also appears in the Act of April 29, 1902, as amended by Sec. 5, of the Deficiency Act, of April 27, 1904 (32 Stat. part 1, p. 176; 33 Stat., pp. 394-428).

Section 25, of the Immigration Act of February 20, 1907 (34 Stat., part 1, pp. 898, 906), provides in part as follows: (

"Provided, that in every case where an alien is excluded from admission into the United States, under *any* law or treaty now existing or hereafter made, the decision of the appropriate immigration officers, if adverse to the admission of such alien, shall be final unless reversed

on APPEAL TO THE SECRETARY OF
COMMERCE AND LABOR."

Under Rule 5, of the "Regulations Governing Admission of Chinese," the Chinese applicant if adjudged to be inadmissible "shall be advised of his right to appeal to the Secretary of Labor;" and (c) "The notice of appeal shall act as a stay upon the disposal of the applicant until a final decision is rendered by the Secretary of Labor."

The Secretary of Labor, therefore, cannot lawfully delegate any power or authority to the Solicitor of the Department of Justice, who is a lawyer detailed to duty in the Department of Labor. Only the President can delegate such power and authority, but not until the emergency arises, as is contemplated by Sections 177 (quoted in the foregoing) and 179, R. S., which is as follows:

"Sec. 179. In any of the cases mentioned in the two preceding sections, except the death, resignation, absence or sickness of the Attorney General, the President may, in his discretion, authorize and direct the head of any other department, or any other officer, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the vacant office until a successor is

appointed, or the sickness or absence of the incumbent shall cease.”

The President has provided, under Section 179, for such an emergency as the law contemplates, by an Executive Order, No. 1783, as follows:

“Pursuant to the authority contained in Section 179, of the Revised Statutes, I hereby authorize and Direct John B. Densmore, Solicitor of the Department of Labor, to perform the duties of Secretary of Labor, during the absence of the Secretary of Labor and the Assistant Secretary of Labor.” June 5, 1913.

There is no such officer as the President described, “Solicitor *of* the Department of Labor,” but no point is made as to that in this proceeding.

If either the Secretary of Labor, or the Assistant Secretary of Labor was on duty at the time the Solicitor, Mr. Densmore, signed the order, the detention is *illegal*. In discharging the prisoners, *In re Tsuie Shee et al*, at San Francisco, October 23rd, 1914, Judge Dooling, of the United States District Court for the Northern District of California, said:

“The appellants were by law entitled to appeal to the Secretary of Labor, and entitled to have their appeal heard and determined by

him except as above stated, and the determination of their appeal by *another not authorized*, is *neither a fair hearing, nor due process of law.*”

As further stated by Honorable Judge M. T. Dooling, in the United States District Court, in re Quan Wy Chung, No. 15,687, filed October 23rd, 1914, as follows:

“Whoever, therefore, challenges his right to act must assume the burden of proving clearly that his action was not had in the ‘absence of the Secretary and Assistant Secretary.’ But, however, inconvenient it may be, if the Secretary and Assistant are not absent, and particularly if both are present, his performance of the duties of the Secretary is unauthorized, either by the statute, or the order of the President. In the case at bar, it is practically conceded, and conclusively established, that the appeal was not determined by the Acting Secretary in the absence of the Secretary and Assistant Secretary, but that, on the contrary both were present, and performing the duties of their office at the time the appeal was determined. The appellants were by law entitled to appeal to the Secretary of Labor, and entitled to have their appeal heard and determined by him, except as above stated, and the determination of their appeal by another, not authorized, was not a fair hearing, nor due process of law.”

Therefore, when the Government in its return to the writ of habeas corpus, as shown in paragraph IV, Record page 14, stated that the said Secretary of the Department of Labor, after due consideration of said appeal, affirmed the decision of said Commissioner of Immigration in the manner provided by law, and the petitioner and appellant had said that the said J. B. Densmore was neither Secretary nor Assistant Secretary, then I contend that the Government must show that J. B. Densmore was Acting Secretary under Executive order, because of the absence of the Secretary and Assistant Secretary, and the petitioner having denied that the Secretary and Assistant Secretary were absent, the burden then is upon the Government to show that the Secretary and Assistant Secretary were absent when J. B. Densmore acted.

There is no presumption of law that the Secretary or Assistant Secretary were absent on September 26th, 1914, or that the solicitor, Mr. Densmore, was Acting Secretary. It is a question of fact to be proved by the one averring it. However, even if the court should hold that the burden of proof was upon the petitioner to prove that J. B. Densmore acted without authority, the stipulation to take

the depositions of Louis F. Post and Corry M. Stadden, of Washington, D. C., as shown by Record p. 26, would have determined the fact at issue before the court, as to the legality of the said J. B. Densmore's order confirming deportation. And Justice Gould having ruled pursuant to a rule to show cause, that said Louis F. Post should answer, as shown by Record p. 31, then it would seem that the Honorable Jeremiah Neterer erred in allowing the Government, on the 25th day of April, 1915, seven months after the petition for writ of habeas corpus had been filed, to make a return showing that the Secretary of the Department of Labor had passed on the record, which, by the original return, as shown by Record, p. 14, which was supposed to be before the court, and make an order recalling the depositions, which would have proven the legality or illegality of the act of the said J. B. Densmore, on the issue which had been made up at the time of the writ of habeas corpus was issued, seven months prior; it seems to me to usurp the dignity of the honorable court in which this petition was filed for a writ of habeas corpus, as well as the Supreme Court of the District of Columbia, in giving the right of an official of the Department to supersede an official of the court

in determining a case wherein the original record, upon which a finding should be made, was not before the Secretary, as the record shows, but before the Honorable Jeremiah Neterer, and who had issued no order giving the Secretary the right to remove the said records and therefore any finding was outside the record, outside the issues then made up, and should not have been allowed.

If this procedure is allowed to be followed then a writ of habeas corpus, which has become the strong arm of protection to one who is being deprived of any right under the Constitution, is of little avail, for if the law gives a man the right, even though he be an alien, to set up the illegality of an act in a petition for writ of habeas corpus, and the issue is made up on that fact, and the original record is before the Honorable Court, before whom that issue was made, then after the petitioner has been put to the expense of going into court and procuring counsel, the Immigration Department can then make little of the high dignity and authority and power of the court, and the strong protecting arm of the writ of habeas corpus, and make a finding upon an alleged true copy of the record, without even notifying the court, or alien, or his counsel, and

the court sanctions such procedure, then, to whom is an alien to look for protection?

UNFAIR HEARING

Taking up now the question as to the allegation of unfair hearing, I contend that there was no evidence upon which the Government, the Commissioner, Acting Secretary, Secretary, or any Chinese Inspector could make a finding:

First: That Chin Shew was not a merchant.

Second That Chin Hing, the applicant and appellant was not a minor son of said Chin Shew, a merchant of New York City, and that he should not be admitted.

The law has been well settled, as stated by this court, in many decisions, and by the Supreme Court, in the case

Chin Yow vs. U. S., 208 U. S. 8;

United States vs. Ju Toy, 198 U. S. 253;

Tang Tun vs. Edsel, 223 U. S., 673.

That the decision of the Department is final, but that is on the presupposition that the decision was

after hearing in good faith, however summary in form, and based upon evidence.

We, therefore, represent to this court that the record in this case comes within the purview of the rule of law laid down by this court, and by the Supreme Court in the cases decided, to-wit, that the action of the executive officers was such as to prevent fair investigation; that there was manifest abuse of the discretion committed to them by the statute; that the proceedings were manifestly unfair, showed the prejudice of the examining inspector, and that there was no evidence upon which to base such findings and order of deportation.

Take the first issue:

The status of the father: The record shows that Chin Shew was a bona fide member of the mercantile firm of Quong Wo Chong Company, doing business of buying and selling merchandise in the City of New York (Record pp. 58-60). The report of the Chinese Inspector in charge, Albert E. Wiley, of New York City, (as shown by Record pages 67 and 68), gives credit to the alleged father and the identifying witnesses and among other things states, as follows:

“THE STATUTORY WITNESSES
ARE REPUTABLE BUSINESS MEN AND

HAVE GAINED THEIR KNOWLEDGE OF THE MERCANTILE STATUS OF CHIN SHEW THROUGH BUSINESS RELATIONS WITH HIM AS A MEMBER OF THE FIRM, AND I MIGHT ALSO STATE THAT CHIN SHEW IS KNOWN TO BE ACTIVELY ENGAGED IN THIS STORE.

“The alleged father, and witness, Fong Goon Moon testified in an unhesitating manner and impressed me that they were telling the truth. No material discrepancies appeared in their statements.

ALBERT E. WILEY,
Chinese Inspector.”

Here is a letter showing personal knowledge of the inspector who saw the witness, interviewed them, and gives his personal opinion.

I wish also to impress upon this honorable court that the Government offered no testimony to rebut the evidence of the status of the father as a merchant, and the court understands that the Chinese Exclusion laws are to exclude Chinese laborers, and not those of the exempt classes, who by law, are admitted, upon proper proof being made.

The evidence of the issue of relationship consists of the statements of Chin Shew, and the Chinese

witness, as well as the statement of the applicant himself.

In the digest of the evidence made by the Commissioner at Washington, (Record pp. 48-51) on page 49 great stress is laid on the fact that there is discrepancy in the testimony of the applicant and his father is in respect to the paternal father; "the applicant having stated, in fact, that this relative is dead, and he had never seen him; and the alleged father having stated that his father died at his home in 1900, which would be within the memory of the applicant."

It seems to me that there is no ground for reaching this conclusion, that the boy is not the son of Chin Shew, because he cannot recollect, within his memory, the appearance of his father's father; that the said boy was of the tender age of five years, and I venture that the members of this court would have, if any recollection, only a hazy one, of the appearance of their paternal parents, if that impression was cut off at the age of five years.

It does not seem that the Immigration law was intended to give to the Immigration Department the power to separate children and parents, based upon such conclusions as we find in this case, as shown by

the record. I would like to ask this honorable court to read the examination of the applicant (Record pp. 60-67), the examination of Chin Shew, the father (Record pp. 69-80), the re-examination of the applicant (Record pp. 85-88), and Your Honors, I am certain, will then come to the conclusion that there is no evidence upon which to base the finding that the applicant was not the minor son of his father, Chin Shew, a merchant of New York City.

Taking up that the contention that the memorandum for the Acting Secretary, included in said Record, as shown by Report of Inspector Mangels to the Commissioner of Immigration (Record pp. 89-91), was an irregular, improper and illegal addition, and was not evidence, was not given under oath, as shown by the record, and should not have been made a part of the record; I will ask Your Honors to look on Record page 90 of said report, wherein the Inspector, without notice to applicant, without giving him a chance to examine said record, or be apprised of the fact that reference was being made to it to bear out the Department's contention that the applicant was not entitled to admission, sets up excerpts from a case therein, stated as the

Chin Quong case, and quotes from said case half a dozen times. The same inspector, in the examination of the applicant (pp. 87 and 88), instead of trying to bring out the testimony in a fair and impartial manner, tried to mix up his questions to the applicant in such a way as to catch him, and showed plainly his unfairness.

It seems to me that under the rule of fairness, even though the power be given to inspectors to summarily examine and decide on a case, that any rule of reason and fairness would require that any evidence upon which the Department would base a finding, be given under oath, and any record in any case, outside of the case then being passed upon, the applicant should be apprised of said record and given a chance, on his own behalf, to meet the allegations of the Department, as shown by the record which they examined, but which the applicant had no knowledge of.

AUTHORITIES

It was said in

U. S. vs. Quan Wah, (D. C.), 214 Fed. 462;

“Nor can the fact that the burden of proof to show right to be in the United States is thrown upon the Chinaman necessitate his further showing that the action of the authorities who decided he had the right to enter was correct, unless the evidence shows that his entry was fraudulently obtained.”

Immigration officers cannot act arbitrarily in refusing to believe persons sought to be deported, or his witnesses.

U. S. vs. Lee Chung, 206 Fed. 367;

In re Chin Wong Lee, 91 Fed. 240;

Wong Chung vs. U. S. 170 Fed. 182;

95 C. C. A., 198;

U. S. vs. Loung San, et al, 144 Fed. 72;

U. S. vs. Lee Huen, 118 Fed. 457.

It is not sufficient to raise a doubt.

U. S. vs. Hong Lin, 214 Fed. 456.

One cannot be deported on insufficient or illegal evidence, ex parte, *Yah Ucaina*, 199 Fed. 885.

In determining whether aliens are entitled to

admission, the immigration authorities act in an administrative and not a judicial capacity, and must follow definite standards. and apply general rules.

U. S. vs. Uhl, 203 Fed. 152.

Congress has seen fit to base the final decision as to the rights of aliens to enter the country in the Department of Commerce and Labor, but that Department is governed by certain rules and regulations, which must be *strictly construed* in conformity with the *eternal principles of justice and right*.

It is fundamental in American jurisprudence that every person is entitled to a fair trial by an impartial tribunal.

U. S. vs. Redfern, 180 Fed. 500.

In the case of *U. S. vs. Williams*, 185, Fed., 598, 599, District Judge Holt, after stating the usual procedure in deportation proceedings, says:

“It is, of course, obvious that such a method of procedure disregards almost every fundamental principle established in England and this country for the protection of persons charged with an offense. The person arrested does not necessarily know who instigated the prosecution. He is held in seclusion and is

not permitted to consult counsel until he has been privately examined under oath. The whole proceeding is usually substantially in control of one of the inspectors, who acts in it as informer, arresting officer, inquisitor, and judge. The Secretary who issues the order of arrest and the order of deportation is an administrative officer who sits hundreds of miles away, and never hears or sees the person proceeded against or the witnesses. Aliens, if arrested, are at least entitled to the rights which such a system accords them; and, if they are deprived of any such right, the proceeding is clearly **IRREGULAR, AND ANY ORDER OF DEPORTATION ISSUED IS INVALID.**"

Where, by the abuse of the discretion or the arbitrary action of the inspector or other executive officer, or without a full and fair hearing, an alien is deprived of his liberty, or about to be deported, the power is conferred, and the duty is imposed upon the courts of the United States to issue a writ of habeas corpus and relieve him.

Chin Yow vs. U. S., 208, page 8;

Low Wah Suey vs. Backus, 225 U. S., 460

That is not a fair hearing in which the inspector chooses or controls the witnesses or prevents the

accused from procuring witnesses or evidence or counsel he desires.

U. S. vs. Sibray, C. C., 178 Fed. 144;

U. S. vs. Williams, D. C., 185 Fed. 598;

Roux vs. Commissioner of Immigration, 203 Fed. 413;

212 C. C. A. 523.

The law is now well settled that no alien can be deported upon mere suspicion, rumors, "repute," information and belief, hearsay statements, reports and letters of a secret nature, not sworn to and without the benefit of cross-examination.

In the case of *Hanges vs. Whitfield*, 209 Fed. 675, it was held, after calling attention to the Immigration rules of November 15, 1911, especially rule 22, and the subdivisions thereof, which prescribe the procedure to be followed in deportation hearings:

"Testimony may, no doubt, be taken in the form of affidavits, or otherwise, preliminary to, and as a basis for, an application for warrants of arrest of specified aliens when the Immigration officers are credibly informed, or have good reasons to believe, that such aliens are unlawfully within the United States. But is the testimony so taken upon the preliminary hearing, even when lawfully taken, admissible

against the aliens upon the hearing required to be given them after warrants for their arrest have been issued, to determine whether or not they shall be deported? * * * It is incumbent upon the Government to establish by *competent evidence* that the petitioners or some of them had violated all or some of the provisions of the Immigration Act as so amended after they were admitted to the United States and prior to their arrest. True, the proceeding for this purpose may be summary, and before an executive, or other authorized official of the Government; but it must be a lawful proceeding, the charge established by competent evidence, and the aliens afforded a fair hearing and opportunity to discredit or disprove the evidence adduced against them. Such an opportunity requires that they have the benefit of counsel at every stage of the proceedings after their arrest, with the right to cross-examine witnesses whose testimony is to be used against them before the Bureau of Immigration in determining whether or not they should be deported."

Further the court says:

"True, the petitioners and their counsel were permitted to examine the record, or copy of the testimony taken by the inspector prior to the application for the warrant of arrest; but of what avail was that? That testimony had already been forwarded to the Bureau of Im-

migration, and an inspection of the record kept by the Inspector would only enable them to read what he had written, without opportunity to test its truthfulness by legitimate cross-examination or otherwise. That such testimony is legally admissible in any proceeding in which it is sought to deprive any person, citizen or alien, of his personal or property rights, cannot be successfully maintained."

This important decision was recently affirmed by the Circuit Court of Appeals for the Eighth Circuit (March 22, 1915), 222 Fed. 745. The Circuit Court of Appeals delivered a most instructive opinion. The court, among other things, said:

"A full and fair hearing on the charges which threaten his deportation and an absence of all abuse of discretion and arbitrary action by the inspector, or other executive officer, are indispensable to the lawful deportation of an alien. Where, by the abuse of the discretion or the arbitrary action of the inspector, or other executive officer, or without a full and fair hearing, an alien is deprived of his liberty, or is about to be deported, the power is conferred and the duty is imposed upon the courts of the United States to issue a writ of habeas corpus and relieve him."

The Japanese Immigration Case, 189 U. S. 86, 100, 101, 23 Sup. Ct. 611, 47 L. Ed. 721;

Chin Yow vs. U. S., 208 U. S., 8, 10, 12, 13,
28 Sup. St., 201, 52 L. Ed., 369;

Low Wah Suey vs. Backus, 225 U. S. 460,
468, 32 Sup. Ct. 734, 56 L. Ed. 1165;

Ex parte Petkos, (D. C.), 212 Fed. 275;

U. S. vs. Chin Len, 187 Fed. 544, C. C. A. 310.

Again, the same learned court states:

“Indispensable requisites of a fair hearing according to these fundamental principles are that the course of proceeding shall be appropriate to the case and just to the party affected; that the accused shall be notified of the nature of the charge against him in time to meet it; that he shall have such an opportunity to be heard that he may, if he chooses, cross-examine the witnesses against him; that he may have time and opportunity, after all the evidence against him is produced and known to him to produce evidence and witnesses to refute it; that the decision shall be governed by and based upon the evidence AT THE HEARING, AND THAT ONLY; AND THAT THE DECISION SHALL NOT BE WITHOUT SUBSTANTIAL EVIDENCE TAKEN AT THE HEARING TO SUPPORT IT.”

In re Rosser, 101 Fed. 562, 567, 41 C. C. A. 497;

In re Wood & Henderson, 210 U. S. 246, 254,
28 Sup. Ct. 621, 52 L. Ed., 1046;

Interstate Commerce Commission vs. Louisville & Nashville R. R. Co., 227 U. S. 88, 91-93, 33 Sup. Ct. 185, 57 L. Ed., 431;

Ex parte Patkos (D. C.), 212 Fed. 275-278;

U. S. vs. Sibray (C. C.), 178 Fed. 144, 149.

Continuing, the Circuit Court of Appeals says (page 754) :

“That was not a fair hearing in which the inspector after the hearing imported into the case and based his finding and recommendation of deportation on hearsay and rumors of alleged facts which there was no evidence to support, and which the accused had no notice of and no opportunity to refute at the hearings.”

Interstate Commerce Co. vs. Louisville & Nashville R. R. Co., 227 U. S. 88, 93, 33 Sup. Ct. 185, 57 L. Ed. 431;

Ex parte Petkos (D. C.), 212 Fed. 275, 277, 278.

That an alien cannot be deported on mere suspicion or anything not amounting to substantial and competent evidence is also announced in another deportation case, that of *Ex parte Lam Pui*, 217 Fed. Rep. 456. In an able opinion, District Judge Connor, said :

“Test-writers and judges have undertaken to define the word ‘evidence,’ as applicable to

judicial investigation, with more or less success. Probably no more satisfactory definition is found for practical purposes, than that given by Mr. Edward Livingstone:

“ ‘Evidence is that which brings to the mind a just conviction of the truth or falsehood of any substantive proposition which is asserted or denied.’

“It is elementary that in judicial proceeding the question whether the record discloses any evidence is for the court. The weight to be given evidence is for the trier of the issue of fact. IT IS ALSO ELEMENTARY THAT MERE SUSPICION, CONJECTURE, SPECULATION, IS NOT EVIDENCE, NEITHER CAN IT BE MADE THE BASIS FOR FINDING A FACT IN ISSUE. The industry of counsel affords a number of illustrative expressions of courts. In *People vs. Van Zile*, 143 N. Y. 372, 36 N. E. 381, Andrews, Chief Justice, says:

“ ‘Suspicion cannot give probative force to testimony which in itself is insufficient to establish or to justify an inference of a particular fact.’

“Judge Caldwell, in *Boyd vs. Glucklich*, 116 Fed. 131, 53 C. C. A. 451, well says:

“ ‘The sea of suspicion has no shore, and

the court that embarks upon it is without rudder or compass.'

"It may be that, upon a full, fair hearing, in which petitioner has the benefit of counsel, and all of his rights secured to him, the government will be able to establish the charge made against him. I am of the opinion that such a hearing has not been had, and that no evidence has been adduced upon which the finding that petitioner procured his certificate by false and fraudulent representations can be sustained. These are the only questions presented upon this record.

"The petitioner is entitled to be discharged from custody. An order to that effect will be drawn."

See also

Jouras vs. Allen, 223 Fed. 756;

Ex parte Ong King Sing, 213 Fed. 119.

In the case of *Ex parte Lam Fuk Tak*, 217 Fed. 468, 469, the Federal Court there said of a report by an Immigration Inspector inserted in the record and used against the alien.

"At this point the inspector puts in a record. 'On the occasion of the visit to that laundry by the inspector in charge, on or about December

20, 1913, this Chinaman was found engaged in laundry work there—126 Market Street.'

"Except for the statement inserted in the record, *not under oath*, and doubtless without the knowledge of the petitioner, by the inspector, there is not a scintilla of evidence tending to establish the charge that petitioner obtained his certificate of admission by false or fraudulent representation. *It is manifestly improper for an inspector, who has a person in his custody charged with the duty of giving him an opportunity to show cause why he should not be deported, to insert in the examination his own unverified statement regarding the very matter in controversy. If he wishes to become a witness against the alien, he should offer himself in the regular way. The petitioner and his counsel should have an opportunity to confront and cross-examine him.*

THE STATEMENT OF THE INSPECTOR MUST BE STRICKEN OUT AND DISREGARDED. THE FACT THAT IT IS INSERTED IN THE RECORD TENDS STRONGLY TO SHOW THAT PETITIONER WAS NOT GIVEN A FAIR HEARING. ELIMINATING THIS STATEMENT, THERE IS NO EVIDENCE UPON WHICH THE ORDER FOR DEPORTATION CAN BE SUSTAINED. LET THE PETITIONER BE DISCHARGED."

As was stated by Judge Morton, 223 Fed. 833:

“The proceedings plainly were not of a judicial character. They cannot be supported, it seems to me, as legitimate administrative proceedings, because the officers did not endeavor themselves to ascertain the truth about the matter. *Teng Yun vs. Edsel*, supra; *U. S. vs. Sprung*, 187 Fed. 903, 907, 110, C. C. A. 37, *Boue on Aliens*, p. 518. They believed that this petitioner was endeavoring to enter the United States fraudulently. They, therefore, instituted proceedings against him, endeavoring by every legal means in their power to procure his deportation. They did not act in bad faith; I do not doubt that they honestly believed the prisoner to be unlawfully here. I think, however, that the IMMIGRATION RECORDS SHOW THAT THEY WERE ENDEAVORING TO MAKE OUT A CASE, RATHER THAN TO ACT IN A FAIR OR JUDICIAL MANNER TOWARD THE ALIEN. I see no other explanation of their refusal to allow him the assistance of counsel, their omission to notify his counsel of the taking of testimony in Pennsylvania, their uncritical acceptance and use of the testimony of Hop Lee, taken in proceedings to which this prisoner was not a party. * * *

These seem to me to be vital questions in considering the fairness of the proceedings; and no answers to them have been suggested by the respondent, except that the officers were not legally obliged to do more than they did, *which*

is the attitude of a prosecutor, rather than of a judge, or of a fair administrative officer, in a case like the present.

“It does not seem to me that the opportunity here given to present evidence and to argue the case rendered the proceedings fair, or in accordance with due process of law. They are to be viewed as a whole, and, so viewed, they present, to my mind, a plain violation of the fundamental principles of fair play by the Immigration Inspectors. I find and rule that the proceedings before them were substantially—and on account of their mistaken attitude towards the matter I think intentionally—unfair to the alien. The Acting Secretary, instead of disaffirming the illegal conduct of his subordinates, approved it and based his decision on it. In this case the petitioner belongs to a race little favored by our law. But it has been held that Immigration tribunals have authority to determine finally, with no appeal to the law courts or to a jury, questions of citizenship; and the next case of this character may be one of an American citizen endeavoring to protect himself against exile by administrative order made in this way. *U. S. vs. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed., 1040; *Tang Tun Case*, *supra*.

“Without considering the other points urged on behalf of the petitioner, I am of opinion that he had not a fair hearing before the Immigration authorities.”

I have gone into this case at great length in trying to impress upon this Honorable Court the fact that while the record shows that one of the administrative officers, Inspector Wiley, of New York City, intended to give the applicant a fair hearing, the others did not, and, as stated in one of the cases above cited, SEEMED ANXIOUS TO MAKE OUT A CASE TO CAUSE DEPORTATION, INSTEAD OF ENDEAVORING TO EXTRACT THE TRUTH.

This Honorable Court, with the power granted to it, should not, by its decision, refuse to look into such abuse of discretion, but should on the other hand, rebuke the high handed methods employed by some of the inspectors throughout this country, as shown in this case.

Would it not be more consistent for this Honorable Court to apply the Golden Rule in this case, and by its decision say to the Immigration Department, and to those acting under the authority of the Secretary of Labor: "It is true that you have been given by Congress, power to summarily pass upon the admission of an alien Chinaman, but 'he is a man for a' that,' a human being, and your procedure must be orderly and consistent with the sub-

stantial justice, regardful of the rights of an alien, and your action of deportation, when same is given, must be founded on facts, on evidence, not mere whim or suspicion." And thus will this court, by its act of justice, lay a foundation for future dealings between the great nations of China and America, which will redound to the benefit of the people of these two great Republics; for it is to America that China looks as a guiding star to that high plane of development and civilization to which this country has attained.

Respectfully submitted,

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ADDITIONAL AUTHORITIES:

Low Kwai v. Backus, C.C.A. No. 2522
decided Feb. 14, 1916;
Gegiow et al. v. U. S. A.,
No. 340, Supreme Court U. S.,
decided Oct. 25, 1915.

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IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

CHIN HING,

Appellant,

VS.

HENRY M. WHITE, as Commis-
sioner of Immigration at the Port
of Seattle, Washington, for the
United States Government,

Appellee.

No. 2651

In the Matter of the Application of CHIN HING,
for a Writ of Habeas Corpus.

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HON. JEREMIAH NETERER, *Judge.*

Brief of Appellee

CLAY ALLEN,

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Attorneys for Appellee.

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STATEMENT OF THE CASE.

The appellant herein, by his attorney, filed in the United States District Court for the Western District of Washington his petition asking that writ of habeas corpus issue out of that court. The peti-

tioner alleged, among other things, that he was an applicant for admission into the United States and that for that purpose had applied to the Commissioner of Immigration at the Port of Seattle, and upon hearing before the Commissioner had been denied admittance and was then imprisoned at the detention house in Seattle awaiting deportation under order of the Commissioner of Immigration. From this order of deportation an appeal had been taken to the Secretary of Labor. The appeal so made was heard before J. B. Densmore, then Solicitor of the Department of Labor and at the time performing the duties of Assistant to the Secretary of Labor. The action of the Commissioner was upon this appeal affirmed by Mr. Densmore, acting for and on behalf of the Secretary of Labor. The petitioner had also filed herein, upon stipulation, his amended petition, and in this amended petition relief was asked against the unlawful action of the immigration authorities in the following particulars:

It was there claimed and it is one of the contentions made by the appellant herein that J. B. Densmore, as Solicitor of the Department of Labor and in the performance of the duties of the Secretary of Labor and his Assistant, was not authorized under the law to hear or pass upon the appeal of the petitioners. It is further alleged in the petition and the

amended petition that the Secretary of Labor and his Assistant were not then actually absent from their posts of duty at Washington and that no duty of the kind or character attempted to be performed by Mr. Densmore on the occasion could be performed by him except in the case of the entire absence of these two officers.

Upon the filing of the original petition an order to show cause was issued against the Commissioner of Immigration and Henry Monroe, Chinese Inspector, directing them to appear and show cause why the application for writ should not be granted and restraining the Commissioner and Inspector from deporting and removing said petitioner from said district or carrying into effect any warrant for his deportation which might be held by them.

Returns and answers to the petition and amended petition were severally filed.

At this time action had been taken by Mr. Densmore but no action had been taken by the Secretary or Assistant Secretary personally with reference to the appeal. An application was then made for a commission to take the deposition of Louis F. Post, Assistant Secretary of Labor, counsel seeking to furnish proof of his allegation as to the position of these officers at their post of duty at the time the appeal was heard by Mr. Densmore. A commission

was issued and, pending the return of this commission, the appeal was submitted to the Secretary of Labor himself and he thereupon concurred in the finding of Mr. Densmore, and directed the deportation of the petitioner. Upon petition then filed in the District Court for the Western District of Washington, reciting these facts, Judge Neterer directed that the commission to take the deposition of Mr. Post be recalled and thereupon dismissed the petition of the appellant.

The complaint of petitioner here assumes a dual form: He complains that Mr. Densmore, as Solicitor and Acting Secretary, had no authority to pass upon the appeal and that the trial court had no authority to entertain evidence as to the action of the Secretary himself occurring subsequent to the filing of the original petition.

It is apparent that if Judge Neterer's position in permitting the amendment was right, no decision on the first question will be necessary.

ARGUMENT.

Statute and Its Interpretation.

The statute provides as follows:

"In every case where an alien is excluded from admission into the United States under any law or treaty now existing, or hereafter

made, the decision of the appropriate customs or immigration officer, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury. 28 Stat. 390."

Under this statute it was held in the case of *United States v. Gin Fung*, 100 Fed. 389, that

"The circuit court has no jurisdiction of habeas corpus proceedings brought by an alien excluded by the collector of the port to determine his right to land, since the collector's determination is not reviewable by the courts, but only on appeal to the Secretary of the Treasury."

Again the Supreme Court passed on the same point in the case of *Lee Lung v. Patterson*, 46 L. Ed. 1108-10, 186 U. S. 169, 175, in which case the court, at pages 174-175 uses the following language:

"These cases establish the doctrine that the collector of customs, in determining the right of Chinese persons to land, may act upon his own information and discretion, and that such action, however taken, is conclusive of the matter, subject to the right of appeal to the secretary of the treasury; that his decision, if he decides not to hear testimony, or not to give effect to evidence which the laws of Congress have provided shall be sufficient to establish the right to land in the first instance, or decides not to decide, is conclusive. Under the doctrine of these cases, it is immaterial, so far as the jurisdiction of this court is concerned, whether the petitioner's appeal to the Secretary of the Treasury is

heard by the Secretary in person or by a subordinate official in his department, or is heard at all.'

It was decided in *Nishimura Ekiu's Case* that Congress might intrust to an executive officer the final determination of the facts upon which an alien's right to land in the United States was made to depend, and that if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency. This doctrine was affirmed in *Lem Moon Sing v. United States*, 158 U. S. 538, 39 L. ed. 1082, 15 Sup. Ct. Rep. 967, and at the present term in *Fok Young Yo v. United States*, 185 U. S. 296, *ante*, 917, 22 Sup. Ct. Rep. 686, and *Lee Gon Yung v. United States*, 185 U. S. 306, *ante* 921, 22 Sup. Ct. Rep. 690."

In re Lee Lung, 102 Fed. 132, 134, the Court uses substantially the same language, at page 134.

*Court No Jurisdiction Unless Commissioner
Reversed on Appeal.*

This habeas corpus decision is not an appeal from the Commissioner to the District Court. No such procedure is permissible. Under the doctrine laid down in the foregoing cases no court will permit itself to interfere with the orderly progress of a matter of this kind in the hands of administrative officers. If the contention of counsel for the appel-

lant is correct, that the decision of Mr. Densmore was in fact a nullity and that no lawful decision upon the Chin Hing appeal was made as a result of his action, the case must be deemed as still pending upon appeal and as yet undecided.

Now, if there is no appeal in effect the court has no jurisdiction, because the Commissioner's decision is final, even in a court of justice until reversed on appeal to the Secretary of Labor; but if it is still pending on appeal the Secretary of Labor still has the right to render his opinion in the case and it comes with bad grace from the petitioner and appellant to object to the action of the Secretary when the sole ground of his petition for his writ of habeas corpus was the fact that the Secretary did not take this action.

The very petition itself shows that the immigration authorities still have jurisdiction and that the matter is still pending before them and that the time limit has not expired for the deciding of the appeal, and no injunction, execution or order of a court of record has suspended the action of the said immigration authorities.

The statute settles the law, because Commissioner White's decision is final unless reversed. Even if the wrong officer affirmed Commissioner White's decision, the Court could not say that he was re-

versed; but if the Court should take the view adopted by Judge Dooling in the case referred to in appellant's brief, *In the matter of the Application of Quan Wy Chung upon behalf of Tsuie Shee, his wife, and Quan Wy You, his son, for a Writ of Habeas Corpus*, decided October 23, 1914, by Judge Dooling, not reported, that the Secretary of Labor or his Assistant must review the appeal, it would be logical to follow the Judge all the way through.

It will be observed that though the Judge held that the Secretary or his Assistant should should review the case when present in the office, he stated (page 4 of decision),

“This being the first time that this question has been presented to the court, the petitioners were not discharged, but it was ordered that their deportation be stayed until their appeal had been heard and determined by competent authority, and if such appeal was not so heard and determined within fifteen days from October 5, 1914, that they might apply to the court for further relief.”

And even though the Department refused to review the decision through the proper officer according to his order, yet Judge Neterer still refused to release the alien, and said that the case was still pending on appeal at Washington, and follows the conclusion of Judge Gilbert in the *Way Tai* case. Judge Neterer says:

“But it does not follow from this that the petitioners here are entitled to an absolute discharge. As said by Judge Gilbert in the case of *Way Tai*, 96 Fed. 484: ‘If the assistant secretary had not the authority to hear and determine the appeal, the appeal has not been disposed of, but is still pending, and the detention of the petitioner by the officer to whom he was intrusted until the disposition of his case on appeal, is not unlawful.’

“The department, however, while still holding the petitioners in custody for deportation, is apparently indisposed to have the appeal heard by any one whom the court believes to be authorized to hear it. The court is not disposed to land these aliens when the local officers have decided against their right to land, and while in the language of Judge Gilbert above quoted their appeal is still pending.”

The Court will find the quotation from the *Way Tai* case, made by Judge Gilbert, in 96 Fed. 486, near the bottom of the page, and will see that that decision absolutely upholds him.

There is no distinction between that case and this. A petition for habeas corpus determines whether or not the petitioner is in the legal custody of the immigration authorities. This does not suspend the appeal. It leaves the case of the Chinaman in statu quo and if the immigration authorities desire to make further orders therein they can do

so. There is no injunction by the court to stop them.

In this case the authorities at Washington evidently decided that Judge Dooling might be right and they would not contest the point, and so they said we will get the proper man to review this case and rectify the alleged injustice done to the petitioner.

We do not see why this Court should wait until the depositions come back from Washington and then determine whether or not the Secretary of Labor or his Assistant should hear the appeal, and then if he should rule that the Secretary or his Assistant should hear the appeal, continue the case as Judge Dooling did for fifteen or thirty days until said Secretary or Assistant could give exactly the same decision which we are offering in evidence.

By the action of the Secretary of Labor in deciding this case in person, all the questions raised in the petition are moot questions.

We know of no stronger argument than a quotation from the able decision of the court below, where the Judge uses the following language:

“I do not think that the position of counsel for the petitioner is tenable. It is highly technical and would not lead to any conclusion of the rights of the petitioner in this controversy. The petitioner in this case could not hope to be

released from custody and permitted to unlawfully enter the United States while his appeal was pending before the Secretary of Labor. If the contention is correct that the 'Acting Secretary' was not clothed with authority by reason of the presence of his superiors qualified to act, then the appeal had not been heard and the threatened deportation of the petitioner was simply premature, and the most that the petitioner could hope for would be a delay of the deportation until the proper officer of the department could determine his appeal. The record discloses that the Secretary of Labor did personally determine this appeal and adversely to the petitioner. The Secretary of Labor having acted, the reason for the disclosure sought by the desposition and interrogatories of the Assistant Secretary of Labor is disposed of. There is nothing at issue, and I think the Commission to take the said deposition should be recalled. Courts are not organized to do idle things, but to determine issues presented, decreeing to the respective parties the rights as law or equity may direct. The entire record now being before the Court, the Court should consider the record now and determine the respective rights of the parties. The Secretary of Labor having personally reviewed the decision of the Commissioner of Immigration, it is unnecessary to examine into the right of the 'Acting Secretary' in the premises."

*Objection that Record Not at Washington When
Secretary Reviewed Decision.*

It was strenuously argued by the attorney on the other side that the Secretary of Commerce and

Labor could not have considered this case on appeal because we had the original record filed and made an exhibit in this cause.

The practice in these cases is that the Immigration Office makes out a duplicate record, the original and the copy both being considered originals by the Department. When we make the record a part of our return we always use what would be a carbon copy, according to state practice, but what according to the Immigration Office is considered one of the originals.

In this case we used the carbon copy which was at Commissioner White's office, and the original of this carbon was in Washington. If the Court thinks it necessary we can call this a copy and we will ask the Court that we may amend our Return by inserting between the words "that" and "the record" in line 15, on page 2, the words "a copy of."

The Court will see that this is the case by reading the second paragraph in the letter on page 101 of the Transcript of Record, which is as follows:

"As this case was decided upon the record as submitted by you, and as you have been furnished a copy of the Bureau's memorandum which was approved by the Department, it is not considered necessary to forward you the record certified by the Department. You can use your own copy in making return to the writ."

And also by the words on page 54 of the Transcript of Record occurring in the decision offered in evidence by the government as exhibit 'B' in the following language:

"It is believed that the inclosed will serve your purpose, without withdrawing from the Bureau's files the entire record, of which you already possess a complete copy with the exception of the notation on the memorandum of the Secretary's approval."

Amendments in Trial Court.

It is believed that the contention of counsel that the trial court should not have permitted the action of the Secretary of Labor, occurring subsequent to the institution of the suit, to be interposed as a defense will give this Court no great concern. The rule that the trial court shall be granted the most extreme latitude in the control of the issues and parties to the suit to the end that substantial justice may be administered, is one too firmly established to scarcely require the citation of authorities.

Section 954 of the Federal Statutes Annotated, Volume 4, page 596, reads as follows:

"No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall

proceed and give judgment according as the right of the cause and matter in law shall appear to it, without demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

The foregoing section has been variously construed from time to time as giving the widest latitude to the trial court in the control of any of the issues before him. As was said in the Supreme Court in the case of *Neale v. Neale*, 9 Wallace 1, 19 L. ed. 590:

"Rules of pleading are made for the attainment of substantial justice, and are to be construed so as to harmonize with it if possible."

Foster's Federal Practice, Volume 1, page 716, lays down the following rule:

"Where state practice is silent, amendments at common law will usually be allowed in cases in which they would be allowed in equity, and they have the same effect."

The equity rule permits,

"The Court may at any time in furtherance of justice, upon such terms as may be just,

permit any process, proceeding, pleading or record to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading."

Montgomery's Federal Procedure declares,

"The matter (of amendment) is entirely within the discretion of the court, and not reviewable except when there has been a gross abuse of discretion."

citing *Lang v. Union Pacific R. R. Co.*, 126 Fed. 340.

Section 914, page 563, Volume 4, Revised Statutes Annotated, provides that in actions at law the federal courts shall conform to the practice of the state of the district.

The practice in the State of Washington is clearly defined by statutes. Section 303 of *Remington & Ballinger's Code*, Volume 1, page 301, provides as follows:

"The court may, in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceedings, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, upon affidavit showing good cause therefor, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars, * * *."

The exact situation found in the case at Bar is provided for in Section 308 of *Remington & Ballinger's Code*, page 307, which reads as follows:

"The court may, on motion, allow supplemental pleadings showing facts which occurred after the former pleadings were filed."

The practice is well established in the State of Washington that amendments may be permitted even to the extent of admitting new parties at the time of trial.

Townsend v. Three Lakes Lumber Co., 67 Wash. 654, 122 Pacific 29.

The attention of the Court is called to the case of *Manitowoc Malting Co. v. Fuechtwanger, et al.*, 169 Fed. 983. In this case plaintiff asked for damages in the sum of \$10,000 and the jury returned a verdict for \$21,664.54. After the verdict was returned motion was made to amend the complaint to conform with the verdict returned. The Court granted the motion and discussed quite at length Section 954, of the Revised Statutes, above quoted, holding that it gives the widest latitude to the trial court in the proceedings before him. At page 986 the Court cites many authorities in support of its position.

See also *United States v. Buford*, 3 Peters, 12, *Jackson v. Ashton*, 10 Peters 480.

While it is believed that this Court will not consider the question as to the regularity of the action taken by Mr. Densmore for the reasons hereinbefore given, it is thought best to call the Court's attention to certain sections that may directly bear upon the contention of counsel. It is the position assumed by the appellee that the trial court has full power to permit any amendment or the introduction of any additional evidence which would assist in arriving at a proper conclusion in the matter. If this power is conceded, then the action of the Secretary has finally made this conclusive, whatever may be the result of the action by the Solicitor in the first instance. In other words, if the Court had full power to permit an amendment to the return and the offer of additional evidence, and the procedure was otherwise regular, nothing remains for the Court to do but to remand the prisoner to the custody of the Commissioner.

In addition to the several sections referred to by counsel, attention is called to the following sections of the federal statutes:

Act of March 4, 1913, page 243 of Federal Statutes Annotated,

“That all laws prescribing the work and defining the duties of the several bureaus, offices, departments or branches of the public service by this Act transferred to and made a part

of Department of Labor shall, so far as the same are not in conflict with the provisions of this Act, remain in full force and effect, *to be executed under the direction of the Secretary of Labor.*" (37 St. at Large 738.)

Section 161, page 58, Volume 3, Revised Statutes Annotated, provides,

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

See *Shillito Co. v. McClung*, 51 Fed. 868-872, in which it was held that,

"The Secretary of the Treasury could have assigned to the Assistant Secretary or Secretaries of the Treasury Department the duty of deciding appeals from assessments made by collectors of customs duties; * * * The reply does not negative the fact that the Assistant Secretary was not assigned by the Secretary of the Treasury to the performance of the duty of deciding the appeal, nor that there was no absence or sickness of the head of the department which devolved the duty upon the Assistant Secretary. Under such circumstances, is the want of authority to be assumed, or will the law raise a presumption to the contrary in support of the official act? *We are clearly of the opinion that the latter is the rule to be applied.*"

The Circuit Court, of which Ex-President Taft was then a member, cites the case of *United States v. Peralta*, 19 Howard 347, 15 L. ed. 678, in which it was held,

“The public acts of public officials purporting to be exercised in an official capacity, and by public authority, shall not be presumed to be usurped, but that a legitimate authority had been previously given or subsequently ratified. To adopt a contrary rule would lead to infinite confusion.”

The case of *Chadwick v. United States*, 3 Fed. 756, adheres to the same doctrine, suggesting:

“Nothing appearing to the contrary, the legal presumption is that the certificate was made in pursuance with a lawful authority.
* * * .”

See also *United States v. Adams*, 24 Fed. 348-351. In *Parish v. United States*, 100 U. S. 500, 25 L. ed. 763, it was held that the action of the Assistant Surgeon General at St. Louis was in effect the action of the Surgeon General at Washington. The Court there points out how impossible it is “for a single individual to perform all the duties imposed upon him by his office.”

It would seem in the case at Bar that where the Federal Congress has provided a trained legal advisor, qualified to respond with legal opinions, and

the Federal Congress has granted to both the President and the Secretary of Labor the power to define the duties and assign the respective duties of the various subordinates, that it was intended and expected that duties would be assigned to the legal advisor of the kind which he is qualified to perform.

We believe that the action of Mr. Densmore, the Solicitor, was legal and valid. Nothing occurs in the record except the allegation of the pleader that the Secretary and Assistant Secretary were not absent at the time of the action taken by the Solicitor. As suggested in the foregoing cases, the presumption is in favor of the legality of the action taken.

It is submitted that the judgment of the lower court should be affirmed.

Respectfully submitted,

CLAY ALLEN,

United States Attorney.

GEORGE P. FISHBURNE,

Assistant United States Attorney.

Attorneys for Appellee.

IN THE
**United States Circuit Court
of Appeals**

FOR THE NINTH CIRCUIT

CHIN HING,

Appellant,

vs.

HENRY M. WHITE, as Commis-
sioner of Immigration, at the
Port of Seattle, Washington, for
the United States Government,
Appellee.

No. 2651

IN RE THE APPLICATION OF CHIN HING
FOR A WRIT OF HABEAS CORPUS

Petition for Rehearing

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510-511 White Building,
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Filed September 2, 1916.

SEP 2 - 1916

F. D. Monckton,
Clerk.

IN THE
United States Circuit Court
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Petition for Rehearing

TO THE HONORABLE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT:

In this case now comes CHIN HING, Appel-
lant in the above entitled cause, and alleges and

shows to this Honorable Court that the opinion and decree made and rendered herein, in the cause aforesaid, and filed with the Clerk of said Court on the 7th day of August, A. D., 1916, is erroneous and contrary to law and justice for the following reasons, to-wit:

I.

Said opinion and decree does not cover the principal issues raised in Appellant's brief, but leaves them virtually the same as prior to the hearing on said case.

II.

The Court erred in conceding "the lack of authority of the Solicitor of the Department of Labor to act in the case under the circumstances stated," and failing to admit or grant, at the same time, the logical and necessary conclusions to be drawn from that concession.

III.

The Court further erred in admitting that "the manifest legal result is that the appeal remained

pending before the Secretary of Labor and undisposed of," and then refusing to support its own admission of fact.

IV.

The Court erred in holding that the approval of the Secretary of Labor, under the circumstances, quieted the issues raised.

V.

The Court further erred in that it assumed legality where such an assumption does not exist.

VI.

The Court further erred in presupposing the legality of certain alleged evidence submitted to the Secretary of Labor.

VII.

The Court further erred in that it failed, neglected or refused to consider and rule upon Appellant's contention that "he had not had a fair and impartial trial before the Inspector in charge of Immigration in Seattle, Washington," as set forth

in his amended petition for the writ of habeas corpus (see p. 20 of the Record).

VIII.

The Court further erred in that it failed, neglected or refused to consider and rule upon Appellant's contention that "there is no evidence in the records to sustain the Department's Exclusion and Deportation Order," as set forth in his amended petition for the writ of habeas corpus (see p. 20 of the Record).

IX.

The Court further erred in that it left unsettled, certain and several questions that became issues vital to Appellant's interests and welfare by reason of the action of the Respondent in this case.

X.

The Court erred in holding that the petitioner was without right and was not entitled to be represented by counsel before the Acting Commissioner of Immigration or the lawful acting Secretary of Labor.

XI.

The Court erred in holding that the petitioner was without right to have counsel appear before the Commissioner General of Immigration or the lawful Secretary of Labor, to orally argue the appeal.

XII.

The Court erred in holding that the petitioner was without right to present new evidence in support of his appeal.

XIII.

The Court further erred in that it issued an order and decree which, in itself, is a denial of Appellant's rights accorded him under the provisions of the Constitution of the United States; is not based upon that full and complete consideration that the nature of the case demands; and does not at all settle or quiet the issues brought before this Honorable Court for adjudication.

For and because of the reasons herein set forth, Appellant contends that he is entitled to a rehearing herein and on a consideration of his said cause

for the administration of justice within the premises and upon the merits thereof.

And for which he will ever pray.

JOHN J. SULLIVAN and

ADAM BEELER,

Attorneys for Petitioner and Appellant.

John J. Sullivan hereby certifies that he is an attorney at law, duly qualified and admitted to practice his profession before this Honorable Court; that he is one of the attorneys of record for the above named petitioner, Chin Hing; that in his judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

IN THE

United States Circuit Court
of Appeals

FOR THE NINTH CIRCUIT

CHIN HING, *Appellant*,

vs.

HENRY M. WHITE, as Commis-
sioner of Immigration, at the
Port of Seattle, Washington, for
the United States Government,
Appellee.

No. 2651.

IN RE THE APPLICATION OF CHIN HING
FOR WRIT OF HABEAS CORPUS.

Argument and Brief in Support
of Petition for Rehearing

JOHN J. SULLIVAN and
ADAM BEELER,
Attorneys for Appellant.

510-511 White Building,
Seattle, Washington.

Filed September —, 1916,

Filed

SEP 6 - 1916

THE HESS PRESS

F. D. Mouckton,
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FOR WRIT OF HABEAS CORPUS.

**Argument and Brief in Support
of Petition for Rehearing**

ARGUMENT.

The filing of this petition for a rehearing of the cause involved herein is based upon the assumption that, when a cause, of whatsoever nature it may be, is brought before this Honorable Court in due form

and in accordance with the Rules in such case made and provided, the party so bringing such cause upon appeal from the court below, is entitled to have the various issues involved in such cause considered upon merit, and to have a ruling made and rendered by this Honorable Court that will, so far as may lie within the power and jurisdiction of said Court, quiet the said issues thus brought for adjudication, and that said issues and each of them may thus be quieted.

In this respect the Court has erred, in that the various issues presented to the Court for adjudication in this cause were not considered upon merit, nor were they quieted to the extent of the Court's power and jurisdiction by its order and decree made and rendered in said cause on the 7th day of August, 1916, as will be hereinafter shown.

On p. 2 of said Opinion, the Court says:

“Conceding the facts so alleged to be true, and conceding the lack of authority of the Solicitor of the Department of Labor to act in the case under the circumstances stated, the manifest legal result is that the appeal remained pending before the Secretary of Labor

and undisposed of. *In re Wai Tai*, 96 Fed. 484.”

The Court, therefore, concedes the lack of authority of the Solicitor of the Department of Labor to act in the case. The Court further concedes, as a logical conclusion to be drawn from the facts, that the “manifest legal result is that the appeal remained pending before the Secretary of Labor and undisposed of.” So far as this concession goes, it leaves nothing to be desired, for it is strictly in accordance with the facts in the case. But it does not go far enough, and therein lies the error attributed to the Court in thus stopping short of the logical conclusion indicated in the said concession.

If the Solicitor of the Department of Labor had no legal authority empowering him to consider said case and render an opinion thereon, having proceeded to consider said case and render an opinion thereon notwithstanding the lack of legal authority so to do, it is a self-evident fact that the consideration of said case by said Solicitor of the Department of Labor, and the opinion rendered thereon by him as a result of such consideration, are illegal and constitute a nullity. This results,

as the Court has conceded, in a condition under which the appeal remained pending before the Secretary of Labor and undisposed of.

But, if the opinion rendered by the said Solicitor of the Department of Labor as a result of his consideration of said case be conceded to be illegal when it was rendered (September 25, 1914), then it must be admitted that said illegal opinion was equally illegal at the time of its approval by the Secretary of Labor (November 13, 1914), and that, under the circumstances of the case, no amount of subsequent approval by the Secretary of Labor could alter its illegality.

The record establishes the fact that the Secretary of Labor did not personally take up and affirm the Order of the Commissioner, but did take up and affirm the illegal and unauthorized opinion of the said Solicitor of the Department of Labor. Within the premises, therefore, and under the circumstances of the case, as they exist and did exist at the time in question, the act of the Secretary of Labor has failed to clothe with legality the illegal act of his subordinate, and the appeal of the appellant in this cause has not, therefore, been legally

acted upon by the one official having the legal authority to consider the case and render an opinion thereon.

In view of this condition of things, appellant in this cause contends that the issues brought before this Honorable Court in this respect, not having been quieted by the Opinion of said Court, are still open issues subject to judicial determination, and that, therefore, he is entitled to a rehearing on said cause.

Had the Solicitor of the Department of Labor had before him at the time he rendered his admittedly erroneous opinion in said case, the original record of the case, which is the only foundation upon which he could base a legal opinion, there would have been some chance for this Honorable Court to accuse appellant of finely drawn technical reasoning in claiming that the subsequent adoption by the Secretary of Labor of the erroneous opinion of the said Solicitor of the Department of Labor failed to make of it a legal opinion. But the truth of the matter precludes this; for neither the Solicitor of the Department of Labor nor the Secretary of Labor had in their possession said original record of the case at the time in question.

At the time the Solicitor of the Department of Labor took up the case for consideration and rendered said erroneous opinion, the original record of the case was before the Honorable Jeremiah Netterer, in the city of Seattle, and he had issued no order giving the Secretary of Labor or any subordinate of said Secretary the right to remove the said records. Therefore, the opinion of the said Solicitor of the Department of Labor was, aside from the question of lack of authority to consider the case in the first place, a matter wholly and entirely outside the record.

The Secretary of Labor did not have before him the original record of the case, but adopted and affirmed the erroneous finding of his subordinate, which finding was wholly outside the record. Therefore the final opinion is also a matter outside the record, and appellant's detention based upon such opinion is illegal and not in accordance with "due process of law."

Unfairness can never be harmonized with justice. An alien who seeks admission to this country and is denied such admission, and feels that he has been unjustly discriminated against in that the

law has been misinterpreted to his detriment, or that he has been deprived of his rights under the law, and raises the issue of personal rights under due process of law in a court of justice, is entitled to just as much nicety of judgment in the determination of his cause as is the citizen of the United States who raises an issue of personal rights under the supreme law of the land in the same court.

Appellant contended, in his amended petition for the writ of habeas corpus, that he had not a fair and impartial trial before the Inspector in charge of Immigration in Seattle, Washington, and that there was no evidence in the record to sustain the Department's exclusion and deportation order. The Respondent replied, denying this contention. Here was raised an issue for this Honorable Court to determine, that appellant was entitled to have determined, but which this Court failed, neglected, or refused to consider and rule upon.

The issues brought to this Court for adjudication are based upon the record of the case, and the Court's determination of said issues must, of necessity, be based upon the same foundation. One of the contentions made by appellant was that "there

is no evidence in the records to sustain the Department's Exclusion and Deportation Order." This contention, evidently, found no place in the consideration of the Court, and no reference was made to it in the Opinion of said Court. This constitutes a denial of a right of which appellant cannot legally be deprived. The contention made does not depend upon judicial opinion as to the veracity of appellant, but rests upon the claim that the record of the case lacks certain essential evidence to support a certain ruling. Therefore, the contention becomes an issue to be judicially determined upon the record that has thus been called into question. This the Court has thus far failed to determine.

Taking up the question as to the allegation of unfair hearing, we contend that there was no evidence upon which the Government, the Commissioner, Acting Secretary, Secretary, or any Chinese Inspector could make a finding:

First: That Chin Shew was not a merchant.

Second: That Chin Hing, the applicant and appellant, was not a minor son of said Chin Shew, a merchant of New York City, and that he should not be admitted.

The law has been well settled, as stated by this Court, in many decisions, and by the Supreme Court in the cases—

Chin Yow vs. U. S., 208 U. S. 8;

United States vs. Ju Toy, 198 U. S. 253;

Tang Tun vs. Edsel, 223 U. S. 673.

That the decision of the Department is final, but that is on the presupposition that the decision was after hearing in good faith, however summary in form, and based upon evidence.

We, therefore, represent to this Court that the record in this case comes within the purview of the rule of law laid down by this Court, and by the Supreme Court in the cases cited, to-wit, that the action of the executive officers was such as to prevent fair investigation; that there was manifest abuse of the discretion committed to them by the statute; that the proceedings were manifestly unfair, showed the prejudice of the examining inspector, and that there was no evidence upon which to base such findings and order of deportation.

Take the first issue:

The Status of the Father: The record shows

that Chin Shaw was a bona fide member of the mercantile firm of Quong Wo Chong Company, doing business of buying and selling merchandise in the City of New York (Record, pp. 58-60). The report of the Chinese Inspector in charge, Albert E. Wiley, of New York City (as shown by Record pp. 67 and 68), gives credit to the alleged father and the identifying witnesses and among other things states, as follows:

“THE STATUTORY WITNESSES ARE REPUTABLE BUSINESS MEN AND HAVE GAINED THEIR KNOWLEDGE OF THE MERCANTILE STATUS OF CHIN SHEW THROUGH BUSINESS RELATIONS WITH HIM AS A MEMBER OF THE FIRM, AND I MIGHT ALSO STATE THAT CHIN SHEW IS KNOWN TO BE ACTIVELY ENGAGED IN THIS STORE.

The alleged father, and witness, Fong Goon Moon, testified in an unhesitating manner and impressed me that they were telling the truth. No material discrepancies appeared in their statements.’

ALBERT E. WILEY,
Chinese Inspector.”

Here is a letter showing personal knowledge of

the inspector who saw the witnesses, interviewed them, and gives his personal opinion.

We wish also to impress upon this honorable Court that the Government offered no testimony to rebut the evidence of the status of the father as a merchant, and the Court understands that the Chinese Exclusion laws are to exclude Chinese laborers, and not those of the exempt classes, who by law, are admitted, upon proof being made.

The evidence of the issue of relationship consists of the statements of Chin Shew, and the Chinese witness, as well as the statement of the applicant himself.

In the digest of the evidence made by the Commissioner at Washington (Record pp. 48-51), on page 49, great stress is laid on the fact that there is discrepancy in the testimony of the applicant and his father in respect to the paternal father; "the applicant having stated, in fact, that this relative is dead, and he had never seen him; and the alleged father having stated that his father died at his home in 1900, which would be within the memory of the applicant."

It seems to us that there is no ground for reaching this conclusion, that the boy is not the son of Chin Shew, because he cannot recollect, within his memory, the appearance of his father's father; that the said boy was of the tender age of five years, and we venture that the members of this court would have, if any recollection, only a hazy one, of the appearance of their paternal parents, if that impression was cut off at the age of five years.

It does not seem that the Immigration law was intended to give to the Immigration Department the power to separate children and parents, based upon such conclusions as we find in this case, as shown by the record. We would like to ask this honorable Court to read the examination of the applicant (Record pp. 60-67), the examination of Chin Shew, the father (Record pp. 69-88), and Your Honors, we are certain, will then come to the conclusion that there is no evidence upon which to base the finding that the applicant was not the minor son of his father, Chin Shew, a merchant of New York City.

Taking up that the contention that the memorandum for the Acting Secretary, included in said

Record, as shown by Report of Inspector Mangels to the Commissioner of Immigration (Record pp. 89-91), was an irregular, improper and illegal addition, and was not evidence, was not given under oath, as shown by the record, and should not have been made a part of the record; we will ask Your Honors to look on Record page 90 of said report, wherein the Inspector, without notice to applicant, without giving him a chance to examine said record, or be apprised of the fact that reference was being made to it to bear out the Department's contention that the applicant was not entitled to admission, sets up excerpts from a case therein, stated as the Chin Quong case, and quotes from said case half a dozen times. The same inspector, in the examination of the applicant (pp. 87 and 88), instead of trying to bring out the testimony in a fair and impartial manner, tried to mix up his questions to the applicant in such a way as to catch him, and showed plainly his unfairness.

It seems to us that under the rule of fairness, even though the power be given to inspectors to summarily examine and decide on a case, that any rule of reason and fairness would require that any

evidence upon which the Department would base a finding, be given under oath, and any record in any case, outside of the case then being passed upon, the applicant should be apprised of said record and given a chance, on his own behalf, to meet the allegations of the Department, as shown by the record which they examined, but which the applicant had no knowledge of.

AUTHORITIES.

It was said in *U. S. vs. Quan Wah* (D. C.), 214 Fed. 462:

“Nor can the fact that the burden of proof to show right to be in the United States is thrown upon the Chinaman necessitate his further showing that the action of the authorities who decided he had the right to enter was correct, unless the evidence shows that his entry was fraudulently obtained.”

Immigration officers cannot act arbitrarily in refusing to believe persons sought to be deported or his witnesses.

U. S. vs. Lee Chung, 206 Fed. 367;

In re. Jew Wong Fay, 91 Fed. 240;

Wong Chung vs. U. S., 170 Fed. 182;

95 C. C. A., 198;

U. S. vs. Loung San et al., 114 Fed. 702;

U. S. vs. Lee Huen, 118 Fed. 457.

It is not sufficient to raise a doubt.

U. S. vs. Hong Lin, 214 Fed. 456.

One cannot be deported on insufficient or illegal evidence, *ex parte, Yah Ucaina*, 199 Fed. 885.

In determining whether aliens are entitled to admission, the immigration authorities act in an administrative and not a judicial capacity, and must follow definite standards, and apply general rules.

U. S. vs. Uhl, 213 Fed. 152.

Congress has seen fit to base the final decision as to the rights of aliens to enter the country in the Department of Commerce and Labor, but that Department is governed by certain rules and regulations, which must be *strictly construed* in conformity with the *eternal principles of justice and right*.

It is fundamental in American jurisprudence that every person is entitled to a fair trial by an impartial tribunal.

U. S. vs. Redfern, 180 Fed. 500.

In the case of *U. S. vs. Williams*, 185 Fed. 598, 599, District Judge Holt, after stating the usual procedure in deportation proceedings, says:

“It is, of course, obvious that such a method of procedure disregards almost every fundamental principle established in England and this country for the protection of persons charged with an offense. The person arrested does not necessarily know who instigated the

prosecution. He is held in seclusion and is not permitted to consult counsel until he has been privately examined under oath. The whole proceeding is usually substantially in control of one of the inspectors, who acts in it as informer, arresting officer, inquisitor, and judge. The Secretary who issues the order of arrest and the order of deportation is an administrative officer, who sits hundreds of miles away, and never hears or sees the person proceeded against or the witnesses. Aliens, if arrested, are at least entitled to the rights which such a system accords them; and, if they are deprived of any such right, the proceeding is clearly **IRREGULAR, AND ANY ORDER OF DEPORTATION ISSUED INVALID.**"

Where, by the abuse of the discretion or the arbitrary action of the inspector or other executive officer, or without a full and fair hearing, an alien is deprived of his liberty, or about to be deported, the power is conferred, and the duty is imposed upon the courts of the United States to issue a writ of habeas corpus and relieve him.

Chin Yow vs. U. S., 208, p. 8;

Low Wah Suey vs. Backus, 225 U. S. 460.

That is not a fair hearing in which the inspector chooses or controls the witnesses or prevents the

accused from procuring witnesses or evidence or counsel he desires.

U. S. vs. Sibray, C. C., 178 Fed. 144;

U. S. vs. Williams, D. C., 185 Fed. 598;

Roux vs. Commissioner of Immigration, 203 Fed. 413; 212 C. C. A. 523.

The law is now well settled that no alien can be deported upon mere suspicion, rumors, "repute," information and belief, hearsay statements, reports and letters of a secret nature, not sworn to and without the benefit of cross-examination.

Appellant was entitled to have his cause reviewed by the Secretary of Labor directly, and upon the original record of the case, without the intermediary of the Solicitor of the Department of Labor. The cause was not so determined by the Secretary of Labor direct, nor did the original record of the case play any part in the review granted the cause.

The Court erred in holding that appellant was not entitled to have his counsel appear before the Commissioner General of Immigration, for the purpose of placing before that official further evidence in the case and orally arguing the appeal.

In the rules governing the admission of Chinese, Rule 5 provides:

“If upon the conclusion of the hearing the Chinese applicant is adjudged to be inadmissible, he shall be advised of his right to appeal to the Secretary of Labor by a notice in the Chinese language. If the rejected applicant elects to appeal, written notice thereof must be served on the officer in charge within five days, exclusive of Sundays, and legal holidays, after rejection.”

Subdivision B, of the rule, provides:

“Applicant’s counsel shall be permitted, *after notice of appeal has been duly filed, to examine the record* upon which the excluding decision is based, and may be loaned a copy of the transcript of testimony contained therein.”

If appellant had the right to have counsel after he had filed his notice of appeal, and if appellant’s counsel had the right to examine the records upon which the excluding decision is passed, appellant then, in analogy, at least, had the right to have his counsel point out to the appellate officer the inaccuracies appearing therefrom. There is no provision in the rules to the effect that appellant’s counsel cannot be orally before the Secretary of

Labor, in order to point out the errors and inaccuracies appearing in the record, and the reasons why the judgment of the Commissioner should be reversed.

It was certainly not the intention of the framers of the rule that the only prerogative of an applicant's counsel was that of merely examining the record, and that thereafter he must forever hold his peace. While it may be true that an applicant on appeal is not entitled to a trial *de novo*, yet if it be granted that he has the right to have counsel after notice of appeal has been filed to examine the record, such counsel must certainly have the right to offer evidence to the Secretary of Labor showing the inaccuracies of the record upon which the excluding decision is based. What possible benefit could accrue to the applicant, or was intended by the framers of the rule to accrue to the applicant, by limiting the services of his counsel to a mere inspection of the records?

In the case of *Ex parte Lam Pui* (D. C.), 217 Fed. 456, the Court said:

“It is true that the right to counsel secured by the Constitution amend. 6, sec. 1, relates only

to criminal prosecutions; but it is equally true that that provision was inserted in the Constitution because the assistance of counsel was recognized as essential to any fair trial of a case against a prisoner. See, too, Amend. 14. To make the defendant's substantial rights in a matter involving personal liberty depend on whether the proceedings be called 'criminal' or 'civil' seems to be unsound. Indeed, historically, the right to counsel in civil cases and upon charges of misdemeanors antedates such right in cases of felony and treason.

Cooley, *Const. Lim.*, p. 475:

“ ‘The presence, advice, and assistance of counsel’ is said by Storey to be necessarily included in ‘due process of law.’

Storey, on *Constitution*, p. 668.

“Without undertaking to say that a prisoner has an absolute right to counsel before administrative boards, not composed of lawyers, or that the denial of counsel would in every case prevent such proceedings from being fair, I am of the opinion that, under such circumstances, as are disclosed in this case, where counsel for a prisoner seasonably requests the privilege of conferring with him before the trial and of being present during the taking of the evidence, the refusal of that request puts upon the official so acting a great burden of explanation and of

scrupulous regard for the prisoner's rights which in this case is not met.

“And while it is true that the administrative boards are, generally speaking, entitled to make their own rules of evidence, and to consider any evidence which to their minds in probative value, there are, nevertheless, certain fundamental principles which can hardly be disregarded, consistently with fair treatment to the prisoner, and which were not observed in this instance. Moreover, he had had a trial in San Francisco, which had resulted in his favor. He was poor and under great difficulty in retrying that issue at a point 3,000 miles away. This seems to me one more circumstance which called upon the officers to be scrupulously careful and fair in their investigation.

In the case of *Hanges vs. Whitfield*, 209 Fed. 675, it was held, after calling attention to the Immigration rules of November 15, 1911, especially rule 22, and the subdivisions thereof, which prescribe the procedure to be followed in deportation hearings:

“Testimony may, no doubt, be taken in the form of affidavits, or otherwise, preliminary to, and as a basis for, an application for warrants of arrest of specified aliens when the Immigration officers are credibly informed, or

have good reasons to believe, that such aliens are unlawfully within the United States. But is the testimony so taken upon the preliminary hearing, even when lawfully taken, admissible against the aliens upon the hearing required to be given them after warrants for their arrest have been issued, to determine whether or not they shall be deported? * * * It is incumbent upon the Government to establish by *competent evidence* that the petitions or some of them had violated all or some of the provisions of the Immigration Act as so amended after they were admitted to the United States and prior to their arrest. True, the proceeding for this purpose may be summary, and before an executive, or other authorized official of the Government; *but it must be a lawful proceeding, the charge established by competent evidence, and the aliens afforded a fair hearing and opportunity to discredit or disprove the evidence adduced against them. Such an opportunity requires that they have the benefit of counsel at every stage of the proceedings after their arrest, with the right to cross-examine witnesses whose testimony is to be used against them before the Bureau of Immigration in determining whether or not they should be deported.*

Further the court says:

“True, the petitioners and their counsel were permitted to examine the record, or copy

of the testimony taken by the inspector prior to the application for the warrant of arrest; but of what avail was that? That testimony had already been forwarded to the Bureau of Immigration and an inspection of the record kept by the Inspector would only enable them to read what he had written, without opportunity to test its truthfulness by legitimate cross-examination or otherwise. That such testimony is legally admissible in any proceeding in which it is sought to deprive any person, citizen or alien, of his personal or property rights, cannot be successfully maintained."

This important decision was recently affirmed by the Circuit Court of Appeals for the Eighth Circuit (March 22, 1915), 222 Fed. 745. The Circuit Court of Appeals delivered a most instructive opinion. The court, among other things, said:

"A full and fair hearing on the charges which threaten his deportation and an absence of all abuse of discretion and arbitrary action by the inspector, or other executive officer, are indispensable to the lawful deportation of an alien. Where, by the abuse of the discretion or the arbitrary action of the inspector, or other executive officer, or without a full and fair hearing, an alien is deprived of his liberty, or is about to be deported, the power is conferred and the duty is imposed upon the courts

of the United States to issue a writ of habeas corpus and relieve him.”

The Japanese Immigration Case, 189 U. S. 86, 100, 101, 23 Sup. Ct. 611, 47 L. Ed. 721;

Chin Yow vs. U. S., 208 U. S. 8, 10, 12, 13, 28 Sup. Ct. 201, 52 L. Ed. 369;

Low Wah Suey vs. Backus, 225 U. S. 460, 468, 32 Sup. Ct. 734, 56 L. Ed. 1165;

Ex parte Petkos (D. C.), 212 Fed. 275;

U. S. vs. Chin Leu, 187 Fed. 544, C. C. A. 310.

Again the learned court states:

“Indispensable requisites of a fair hearing according to these fundamental principles are that the course of proceeding shall be appropriate to the case and just to the party affected; that the accused shall be notified of the nature of the charge against him in time to meet it; that he shall have such an opportunity to be heard that he may, if he chooses, cross-examine the witnesses against him; that he may have time and opportunity, after all the evidence against him is produced and known to him to produce evidence and witnesses to refute it; that the decision shall be governed by and based upon the evidence AT THE HEARING, AND THAT ONLY; AND THAT THE DECISION SHALL NOT BE WITHOUT SUBSTAN-

TIAL EVIDENCE TAKEN AT THE HEARING TO SUPPORT IT.”

In re Rosser, 101 Fed. 562, 567, 41 C. C. A. 497;

In re Wood & Henderson, 210 U. S. 246, 254, 28 Sup. Ct. 621, 52 L. Ed., 1046;

Interstate Commerce Commission vs. Louisville & Nashville R. R. Co., 227 U. S. 88, 91-93, 33 Sup. Ct. 185, 57 L. Ed., 431;

Ex parte Patkos (D. C.), 212 Fed. 275-278;

U. S. vs. Sibray (C. C.), 178 Fed. 144, 149.

Continuing, the Circuit Court of Appeals says (page 754):

“That was not a fair hearing in which the inspector after the hearing imported into the case and based his finding and recommendation of deportation on hearsay and rumors of alleged facts which there was no evidence to support, and which the accused had no notice of and no opportunity to refute at the hearings.”

Interstate Commerce Co. vs. Louisville & Nashville R. R. Co., 227 U. S. 88, 93, 33 Sup. Ct. 185, 57 L. Ed. 431;

Ex parte Petkos (D. C.), 212 Fed. 275, 277, 278.

That an alien cannot be deported on mere suspi-

dion or anything not amounting to substantial and competent evidence is also announced in another deportation case, that of *Ex parte Lam Pui*, 217 Fed. Rep. 456. In an able opinion, District Judge Conner, said:

“Test-writers and judges have undertaken to define the word ‘evidence,’ as applicable to judicial investigation, with more or less success. Probably no more satisfactory definition is found for practical purposes, than that given by Mr. Edward Livingstone:

“ ‘Evidence is that which brings to the mind a just conviction of the truth or falsehood of any substantive proposition which is asserted or denied.’

“ ‘It is elementary that in judicial proceeding the question whether the record discloses any evidence is for the court. The weight to be given evidence is for the trier of the issue of fact. IT IS ALSO ELEMENTARY THAT MERE SUSPICION, CONJECTURE, SPECULATION, IS NOT EVIDENCE, NEITHER CAN IT BE MADE THE BASIS FOR FINDING A FACT IN ISSUE. The industry of counsel affords a number of illustrative expressions of courts. In *People vs. Van Zile*, 143 N. Y. 372, 36 N. E. 381, Andrews, Chief Justice, says:

“ ‘Suspicion cannot give probative force to testimony which in itself is insufficient to establish or to justify an inference of a particular fact.’

“ ‘Judge Caldwell, in *Boyd vs. Glucklich*, 116 Fed. 131, 53 C. C. A. 451, well says:

“ ‘The sea of suspicion has no shore, and the court that embarks upon it is without rudder or compass.’

“ ‘It may be that, upon a full, fair hearing in which *petitioner has the benefit of counsel and all of his rights secured to him, the government will be able to establish the charge made against him.* I am of the opinion that such a hearing has not been had, and that no evidence has been adduced upon which the finding that petitioner procured his certificate by false and fraudulent representations can be sustained. These are the only questions presented upon this record.

“ ‘The petitioner is entitled to be discharged from custody. An order to that effect will be drawn.’ ”

See also

Jonras vs. Allen, 223 Fed. 756;

Ex parte Ong King Sing, 213 Fed. 119.

In the case of *Ex parte Lam Fuk Tak*, 217 Fed.

468, 469, the Federal Court there said of a report by an Immigration Inspector inserted in the record and used against the alien.

“At this point the inspector puts in a record. ‘On the occasion of the visit to that laundry by the inspector in charge, on or about December 20, 1913, this Chinaman was found engaged in laundry work there—126 Market street.’

“Except for the statement inserted in the record, *not under oath*, and doubtless without the knowledge of the petitioner, by the inspector, there is not a scintilla of evidence tending to establish the charge that petitioner obtained his certificate of admission by false or fraudulent representation. *It is manifestly improper for an inspector, who has a person in his custody charged with the duty of giving him an opportunity to show cause why he should not be deported, to insert in the examination his own unverified statement regarding the very matter in controversy. If he wishes to become a witness against the alien, he should offer himself in the regular way. The petitioner and his counsel should have an opportunity to confront and cross-examine him.*

“THE STATEMENT OF THE INSPECTOR MUST BE STRICKEN OUT AND DISREGARDED, THE FACT THAT IT IS

INSERTED IN THE RECORD TENDS STRONGLY TO SHOW THAT PETITIONER WAS NOT GIVEN A FAIR HEARING. ELIMINATING THIS STATEMENT, THERE IS NO EVIDENCE UPON WHICH THE ORDER FOR DEPORTATION CAN BE SUSTAINED. LET THE PETITIONER BE DISCHARGED."

As was stated by Judge Morton, 223 Fed. 833:

"The proceedings plainly were not of a judicial character. They cannot be supported, it seems to me, as legitimate administrative proceedings, because the officers did not endeavor themselves to ascertain the truth about the matter. *Teng Yun vs. Edsel*, supra; *U. S. vs. Sprung*, 187 Fed. 903, 907, 110, C. C. A. 37, Bouve on Aliens, p. 518. They believed that this petitioner was endeavoring to enter the United States fraudulently. They, therefore, instituted proceedings against him, endeavoring by every legal means in their power to procure his deportation. They did not act in bad faith; I do not doubt that they honestly believed the prisoner to be unlawfully here. I think, however, that the IMMIGRATION RECORDS SHOW THAT THEY WERE ENDEAVORING TO MAKE OUT A CASE, RATHER THAN TO ACT IN A FAIR OR JUDICIAL MANNER TOWARD THE ALIEN. I see no other explanation of their

refusal to allow him the assistance of counsel, their omission to notify his counsel of the taking of testimony in Pennsylvania, their uncritical acceptance and use of the testimony of Hop Lee, taken in proceedings to which this prisoner was not a party. . . . These seem to me to be vital questions in considering the fairness of the proceedings; and no answers to them have been suggested by the respondent, except that the officers were not legally obliged to do more than they did, *which is the attitude of a prosecutor*, rather than of a judge, or of a fair administrative officer, in a case like the present.

“It does not seem to me that the opportunity here given to present evidence and to argue the case rendered the proceedings fair, or in accordance with due process of law. They are to be viewed as a whole, and so viewed, they present, to my mind, a plain violation of the fundamental principles of fair play by the Immigration Inspectors. I find and rule that the proceedings before them were substantially—and on account of their mistaken attitude towards the matter I think intentionally—unfair to the alien. The Acting Secretary, instead of disaffirming the illegal conduct of his subordinates, approved it and based his decision on it. In this case the petitioner belongs to a race little favored by our law. But it has been held that Immigration tribunals have

authority to determine finally, with no appeal to the law courts or to a jury, questions of citizenship; *U. S. vs. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040; *Tang Tun Case*, supra.”

Without subdivision B of rule 5 and the expression of the eminent judges in the foregoing authorities, your appellant contends that the natural dictates of justice and fair play would grant the petitioner the right to fully and fairly present all of the facts of his appeal, either by oral argument or brief. The law affords to the appellant the right of appeal in every case where the commissioner has ruled unfavorably against the applicant, and to deprive any person seeking to enter the portals of this country the aid of counsel to properly present his appeal to the proper appellant officer would in effect deprive that person of the right of appeal. The court in its opinion said:

“No provision of any statute and no rule of the department has been cited conferring upon the petitioner the right thus claimed, i. e. to present further evidence and orally argue the appeal.”

Admitting that to be true, it is especially true that the appellee cited no statute or authorities prohibiting that right, and therefore, in the absence of such statute or rule, the spirit of fair play and justice would naturally afford him that right, notwithstanding that it might cause some inconvenience to the Commissioner General of Immigration or the acting Secretary of Labor.

The court further says the volume of business the department is necessarily called upon to transact would obviously render oral argument impossible. We contend that no amount of labor imposed upon any administrative officer or judicial officer can be made an excuse for the perpetration of an injustice. We contend that to permit counsel to orally argue the cause of his client would not in any way add to the burden of the appellate officer or retard justice, but by pointing out the errors made by the commissioner, and fully and fairly presenting the cause of his client by oral argument, would in all probability lessen the labors of the appellate officer and expedite justice, and would, no doubt, aid to reach a just conclusion. To deny any person seeking to enter the United States, as

the son of his father, the right to the aid of counsel to establish that fact, throughout all of the proceedings, would disregard every fundamental principle established in England and the United States, and would be contrary to every known principle of justice, and the next case might be an American citizen endeavoring to protect himself from exile by an administrative order made in this way.

And your appellee most respectfully and earnestly urges that this honorable court erred in its duty in failing,

1st. To consider and rule upon appellant's contention that he had not had a fair and impartial trial before the inspector in charge of immigration in Seattle, Washington, as set forth in his Amended Petition for writ of habeas corpus (p. 20 of Record).

2nd. The court further erred in that it failed, neglected or refused to consider and rule upon appellant's contention "that there is no evidence in the records to sustain the Department's Exclusion and Deportation Order, as set forth in his Amended Petition for writ of habeas corpus (p. 20 of Record).

3rd. The court erred in holding that the petitioner was without right to have counsel appear before the Commissioner General of Immigration or the lawful Secretary of Labor to orally argue the appeal.

4th. The court erred in holding that the petitioner was without right to present new evidence in support of his appeal.

5th. The court erred in conceding the lack of authority of the Solicitor of the Department of Labor to act in the case under the circumstances, and failed to admit or grant, at the same time, the logical and necessary conclusions to be drawn from that concession.

6th. The court erred in holding that the approval of the Secretary of Labor, under the circumstances, quieted the issues raised.

Therefore, appellant feeling himself to have been aggrieved and injured by reason of the partial consideration accorded the issues of his cause in this court and the incomplete information made and rendered by said court therein, and believing that he has good and substantial grounds upon which to

base this petition, does hereby pray this honorable court to grant a re-hearing of the issues of said cause, to the end that said issues may be judicially quieted and justice administered.

Attorneys for Appellant.

United States
Circuit Court of Appeals
For the Ninth Circuit.

A. R. TITLOW, as Receiver of the UNITED
STATES NATIONAL BANK OF CEN-
TRALIA, WASHINGTON,

Appellant,

vs.

JOHN E. SUNDQUIST, WALTER GUSTAFSON
and IZELLA J. SMITH,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court
for the Western District of Washington,
Southern Division.

Filed

OCT 6 - 1915

F. D. Monckton,

Clerk.

United States
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A. R. TITLOW, as Receiver of the UNITED
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of the Attorneys.

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and THOMAS N. VANCE, Esquire, Olympia,
Washington,

Solicitors for the Appellee Izella J. Smith,
FREDERICK BAUSMAN, Esquire, ROBERT P.
OLDHAM, Esquire, and ROBERT C. GOOD-
ALE, Esquire, #1408-16 Hoge Building,
Seattle, Washington,

Solicitors for the Appellant. [1*]

[Title of Court and Cause.]

Praecept of the Defendant Receiver for Record.

To Frank L. Crosby, Clerk of said Court:

Kindly prepare, certify and transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, a typewritten transcript of the record upon appeal in the above-entitled cause, containing the following portions of the record in the above-entitled cause, to wit (omitting all captions, endorsements, verifications, etc., excepting file-marks).

1. Complaint.
2. Answer of Clinton A. Snowden, Receiver, to the Complaint.

*Page-number appearing at foot of page of certified Transcript of Record.

3. Reply, to Answer of Clinton A. Snowden, Receiver.
4. Stipulation for Substitution of Clinton A. Snowden for Francis A. Chapman as Party Defendant.
5. Order Allowing such Substitution.
6. Stipulation for Substitution of A. R. Titlow as Party Defendant in Place of Clinton A. Snowden and Order Allowing Same.
7. Stipulation as to This Cause Being One in Equity.
 - (a) Stipulation Signed by Bausman, Oldham & Goodale, and by B. A. Crowl.
 - (b) Stipulation Signed by Bausman, Oldham & Goodale and Messrs. Vance & Parr.
8. Decree.
9. Petition for Appeal.
10. Assignment of Errors.
11. Order Allowing Appeal.
12. Citation.
13. Statement of Evidence, and Order Approving Same.
14. Praecept of the Defendant, Receiver for Record on Appeal.
15. Certificate from Comptroller of Currency Directing Appeal. [2]
16. Notice of filing Defendants' Proposed Statement of Testimony.
17. Proof of Service Upon Walter Gustafson of
 - (a) Citation,

(b) Notice of Filing Proposed Statement
ment of Evidence,

(c) Praeipe of the Defendant Receiver
for Record on Appeal.

Dated August 2, 1915.

BAUSMAN, OLDHAM & GOODALE,
Attorneys for Defendant, A. R. Titlow, Receiver of
the United States National Bank of Centralia.

Copy of the within praecipec received and service
acknowledged this 2d day of August, 1915.

B. A. CROWL,
Attorneys for Plaintiff.

Copy of the within praecipec received and service
acknowledged this 3 day of August, 1915.

HARRY L. PARR,
Attorneys for Izella J. Smith.

[Endorsed]: Filed in the U. S. District Court,
Western Dist. of Washington, Southern Division.
Aug. 11, 1915. Frank L. Crosby, Clerk. By F. M.
Harshberger, Deputy. [3]

Return on Service of Writ.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the an-
nexed Praecipec of Defendant Receiver for record on
the therein named Walter Gustafson, by handing to
and leaving a true and correct copy thereof with
Walter Gustafson, personally at Rochester, Wash.,

in said District, on the 3d day of August, A. D. 1915.

JOHN M. BOYLE,

U. S. Marshal.

By John T. Secrist,

Deputy.

Marshal's Fees: \$2.00 [4]

*In the United States District Court for the Western
District of Washington, Southern Division.*

No. 1693.

JOHN E. SUNDQUIST,

Plaintiff,

vs.

FRANCIS A. CHAPMAN, Receiver of the United
States National Bank of Centralia, WALTER
GUSTAFSON, and IZELLA J. SMITH,
Defendants.

Complaint.

Comes now the above-named plaintiff, John E. Sundquist, and complains of the above-named defendants, and alleges and says:

I.

That at all times hereinafter mentioned the United States National Bank of Centralia was a national bank organized and existing under the laws of the United States, with its principal place of business at the city of Centralia, county of Lewis, State of Washington.

II.

That shortly prior to the 21st day of September, 1914, said United States National Bank became and

was insolvent, and that on said 21st day of September, 1914, the defendant, Francis A. Chapman, was duly appointed Receiver of said United States National Bank, by the Controller of the Currency of the United States, and now is and ever since has been in full possession and control of all the assets and affairs of said bank.

III.

That on or about the 31st day of August, 1914, the plaintiff, John E. Sundquist, who is a resident of said District and [5] Division of said Court, deposited in the said United States National Bank of Centralia the sum of Twelve Hundred and Ninety-six (\$1296.00) Dollars, in lawful money of the United States, and that at the time of making the said deposit it was agreed by and between said plaintiff and said bank that the said sum of money should be applied by said bank in payment of a certain mortgage and promissory note, and interest thereon, said mortgage being for the principal sum of Twelve Hundred (\$1200.00) Dollars, and the remaining sum of Ninety-six (\$96.00) Dollars being for accrued interest thereon, said mortgage and note being executed by the defendant, Walter Gustafson, payable to the order of the defendant, Izella J. Smith, and at said time held and owned by said defendant Izella J. Smith. It was further expressly agreed between the plaintiff and said parties that said sum of Twelve Hundred and Ninety-six (\$1296.00) Dollars should be paid to the said Izella J. Smith in satisfaction of said mortgage and discharge of said debt, and that the said money should not be used by said bank for

any other purpose whatever. That at said time, to wit: on the 31st day of August, 1914, the said bank made, executed and delivered to the plaintiff the following writing, in words and figures to wit:

Centralia, Wash., 190—.

Received from John E. Sundquist Twelve Hundred Ninety six \$ Dollars a/c Mortgage Walter Gustafson to Izella J. Smith \$1200.00 & Int. 96.00.

\$1296.00

C. S. GILCHRIST, V. P.

IV.

That the said United States National Bank of Centralia failed, neglected and refused to pay the said money, or any part thereof, to the said Izella J. Smith, and retained the said money and wrongfully held the same and the whole thereof, until the said bank became insolvent on or about said 21st day of September, 1914. [6]

V.

That the said defendant, Francis A. Chapman, Receiver of said United States National Bank of Centralia, is now in possession and full control, as heretofore alleged, of all the funds and assets of said bank and also of said sum of Twelve Hundred and Ninety-six (\$1296.00) Dollars deposited therein by the plaintiff; that prior to the commencement of this action the plaintiff demanded of said defendant, Francis A. Chapman, as Receiver as aforesaid, the payment to him and return of said sum of Twelve Hundred and Ninety-six (\$1296.00) Dollars, and that said Receiver refused and still refuses to pay to plaintiff said sum of money, or any part thereof, and that there is now due and owing to the said plaintiff

from said Receiver the said sum of Twelve Hundred and Ninety-six (\$1296.00) Dollars, together with interest thereon from said 31st day of August, 1914.

VI.

That each and all of defendants herein are residents of the State of Washington, and of said District and Division of this Court.

VII.

That the defendants, Walter Gustafson and Izella J. Smith claim some right to or interest in the said sum of money, but plaintiff alleges that such claim is junior and inferior to his right thereto, and that he is entitled to the whole thereof.

WHEREFORE, plaintiff prays:

1st. That he be given judgment against the said defendant, Francis A. Chapman, as Receiver of said United States National Bank of Centralia, for the sum of Twelve Hundred and Ninety-six (\$1296.00) Dollars, together with interest thereon from August 31st, 1914, at the rate of six per cent, and for his costs and [7] disbursements herein, and that it be adjudged and decreed by the Court that the plaintiff is entitled to the said money, free and clear of any claim or interest of any of the defendants.

2d. For all other and further relief that the Court may deem just and equitable.

B. A. CROWL,

Attorney for Plaintiff.

Office & P. O. Address: Suite 406, Bank of California Building, Tacoma, Washington.

(Verification.)

(Filed Nov. 14, 1914.) [8]

Answer of Clinton A. Snowden, Receiver United States National Bank of Centralia, Lewis County, Washington.

Comes now Clinton A. Snowden, Receiver of the United States National Bank of Centralia, Lewis County, Washington, and for answer to the complaint of plaintiff herein alleges and says:—

I.

That as to the allegations and statements made in paragraph or subdivision II of said complaint he admits that on the 21st day of September, 1914, Francis A. Chapman was duly appointed Receiver of said United States National Bank by the Comptroller of the Currency of the United States, and that he, the said Clinton A. Snowden, is now in full possession and control of the assets and affairs of said bank, but denied that prior to the 21st day of September, 1914, the said bank was insolvent.

II.

As to paragraph or subdivision III thereof he denies that he has any knowledge or sufficient information to form a belief as to the residence of said John E. Sundquist, and he denies absolutely that on the 31st day of August, 1914, the said John E. Sundquist deposited in said United States National Bank of Centralia the sum of \$1296.00, or any other sum whatsoever, in lawful money of the United States or any other form of money, or made any deposit of money in said bank at all, and denies that it was at that time on said 31st day of August or at any other time agreed between said plaintiff, John E. Sundquist,

and said bank, that said sum of money should be applied by said bank in the payment of a certain mortgage and [9] promissory note and interest thereon, the principal note being for \$1200.00 and the claim of interest for \$96.00, and denies that said bank made any contract at all concerning the same, and as to the allegation of the ownership of the note and mortgage by the said codefendant, Izella J. Smith, this defendant denies that he has any knowledge or sufficient information to form a belief as to the same, therefore he denies that he had any knowledge concerning the same.

As to the purported writing set forth in said paragraph or subdivision of the complaint this defendant denies that he has any knowledge or sufficient information to form a belief, therefore he denies the allegation, and this defendant denies each and every other allegation in said paragraph or subdivision contained.

And now further answering the said paragraph or subdivision of said complaint this defendant alleges that on the 31st day of August, 1914, the said plaintiff had 3 certificates of deposit with said United States National Bank of Centralia which had been of long standing prior to said date. That on or about said date he came to said bank and asked that the said certificates of deposit which he had at that time, which amounted to \$3000.00 in all, be changed, one to be made out for the sum of \$1296.00 payable to Izella J. Smith, and the balance of said \$2000.00 was taken partly in cash as this defendant is informed and believes and other *certificates deposit*

sufficient to consume the balance or \$704.00.

III.

As to paragraph or subdivision IV of said complaint this defendant denies each and every allegation therein contained, [10] and further answering said paragraph or subdivision of said complaint alleges the fact to be that it received, as hereinbefore alleged, no money from said plaintiff, John E. Sundquist, on the 31st day of August, 1914, or at any other time since said time, for the purposes therein mentioned and set forth, but alleges the fact to be as hereinbefore alleged concerning the certificates of deposit and the reissuance as hereinbefore alleged.

IV.

As to paragraph or subdivision V thereof this defendant says, that he admits that he is in full possession and control of the assets and funds of said bank, but denies that he has the \$1296.00 mentioned in said paragraph or subdivision of the complaint or that there was any such sum deposited as therein alleged, and he admits that the demand was made upon his predecessor, Francis A. Chapman, for the payment of \$1296.00 and that said predecessor refused to pay the same or any part thereof, and denies that there is anything due to said plaintiff as in said paragraph or subdivision alleged, but alleges the fact to be that said John E. Sundquist, the plaintiff herein, as a creditor of said United States National Bank and upon presentation of the proper claim he will have his claim allowed as a general creditor of said bank.

V.

As to paragraph or subdivision VII thereof this defendant denies that he has any knowledge or sufficient information to form a belief as to the allegation therein contained, therefore he denies each and every allegation therein contained.

WHEREFORE, this defendant prays that said plaintiff may take nothing by this his said action; that his action be dismissed [11] and that this defendant have judgment against said plaintiff for his costs and disbursements herein and for all other and further relief that the Court may deem just in the cause.

This defendant further prays that the plaintiff be required to bring in by process, if he has not already had served, his codefendants Izella J. Smith and Walter Gustafson, that all the rights of all the parties may be finally and completely adjudicated in this action and all the rights finally determined herein, and that he may not proceed further until said parties are brought in by the proper process in this action.

A. R. TITLOW,

Attorney for Defendant Clinton A. Snowden, Receiver of the United States National Bank of Centralia, Washington.

(Verification.)

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 22, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy [12]

Stipulation for Substitution of a Party Defendant.

It is hereby stipulated by and between B. A. Crowl, attorney for the plaintiff herein, and A. R. Titlow, attorney for Clinton A. Snowden, Receiver of the United States National Bank of Centralia, that heretofore, to wit, on the 21st day of September, 1914, the above-named defendant, Francis A. Chapman, was duly appointed by the Comptroller of the Currency of the United States Receiver of the United States National Bank of Centralia, Lewis County, Washington, which was a corporation organized under the banking laws of the United States with its principal place of business and headquarters at Centralia, Lewis County, Washington; that on said 31st day of September, 1914, said bank became and was insolvent and said Francis A. Chapman duly qualified, became and was the duly appointed, qualified and acting Receiver of said United States National Bank, in possession of all its assets, properties, monies, etc., with the power to liquidate the same and to settle up its affairs of depositors and creditors, and was such up until the 14th day of November, 1914, on which date said Francis A. Chapman as such Receiver resigned such office, position and representative capacity and thereafter, to wit, on the 16th day of November, 1914, Clinton A. Snowden, was, by the Comptroller of the Currency of the United States, duly appointed Receiver for said Bank, and in the place and stead and is a successor of said Francis A. Chapman, and that the said Clinton A. Snowden is now the duly appointed, qualified and act-

ing Receiver of said United States National Bank and in possession of all its monies, properties and assets with full power to collect and [13] liquidate the same and pay off the depositors and creditors of said Bank and wind up its affairs. That said Chapman ceased to be Receiver of said Bank on said 14th day of November, 1914, and that said Clinton A. Snowden ever since said 16th day of November, 1914, has been such Receiver; and

It is hereby further stipulated that this Honorable Court shall make its order substituting as defendant in said cause said Clinton A. Snowden Receiver in the place and stead of said Francis A. Chapman, and that the name of said Francis A. Chapman be dropped from the title of this cause and be no further considered in this action.

Dated this 3d day of December, 1914.

B. A. CROWL,

Attorney for Plaintiff.

A. R. TITLOW,

Attorney for Clinton A. Snowden, Receiver of the
United States National Bank of Centralia, Lewis
County, Washington.

[Endorsed]: Filed in the U. S. District Court
Western Dist. of Washington, Southern Division.
Dec. 4, 1914. Frank L. Crosby, Clerk. By E. C.
Ellington, Deputy. [14]

(Order Substituting Clinton A. Snowden in Place of Francis A. Chapman as Receiver of U. S. National Bank of Centralia.)

This cause coming on for hearing on the application of the plaintiff by his attorney, B. A. Crowl, and Clinton A. Snowden, Receiver of the United States National Bank of Centralia, by his attorney, A. R. Titlow, to substitute the name of Clinton A. Snowden in the place and stead of Francis A. Chapman as Receiver of the United States National Bank of Centralia, and it appearing to the Court that said parties have stipulated for said substitution and that the said Francis A. Chapman resigned from said position as Receiver of the said United States National Bank of Centralia on the 14th day of November, 1914, and that thereafter Clinton A. Snowden was appointed as such Receiver and has succeeded to all the rights, duties and powers of said Francis A. Chapman as such Receiver; and it further appearing that the said Clinton A. Snowden now is the duly appointed, qualified and acting Receiver of the United States National Bank of Centralia, Washington, and in possession of all the monies, properties and assets of such corporation or entitled to the possession of the same, with full power to liquidate said assets and to settle and adjust with the creditors and depositors of said bank, it is, therefore,

Hereby Ordered and Adjudged that the said Francis A. Chapman be and is hereby dismissed and dropped from said cause, and that the said Clinton

A. Snowden be and is hereby substituted in the place and stead of said Francis A. Chapman, and that this cause shall proceed now henceforth against said Clinton A. Snowden, Receiver of said United States National Bank of Centralia, in the place and stead of Francis A. Chapman. [15]

Done in open court this 5th day of December, A. D. 1914.

EDWARD E. CUSHMAN,
Judge of said Court.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 5, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [16]

Reply to Answer of Clinton A. Snowden, Receiver.

Comes now John E. Sundquist, plaintiff, in above-entitled action, and for reply to the answer of defendant, Clinton A. Snowden, Receiver of the United States National Bank of Centralia, alleges and says:

I.

Replying to paragraph two of said answer, plaintiff denies that on the 31st day of August, 1914, or at any other time, he authorized, directed or requested the said United States National Bank of Centralia to make out or issue a certificate of deposit in the name of, or payable to Isella J. Smith for the sum of \$1,296.00 or any other amount; and further replying to said paragraph two, plaintiff alleges that on said 31st day of August, 1914, as alleged in plaintiff's complaint herein, plaintiff deposited in said

bank the sum of \$1,296.00 under the express agreement that the same should be applied in payment of a certain note and mortgage for the principal sum of \$1,200.00, made and executed by the defendant, Walter Gustafson, payable to the order of the defendant, Isella J. Smith; that on the 4th day of September, 1914, the said bank in writing, notified the said defendant, Izella J. Smith, that the said sum of money had been so deposited for said purpose, and requested her to forward direct to said bank the said note and a proper release of said mortgage; that in compliance with said request the defendant, Izella J. Smith, did promptly forward to said bank the said note properly endorsed, together with a proper release of the said mortgage, which said note and release were duly received by the said United States National Bank of Centralia long prior to the [17] time said bank discontinued business on account of insolvency.

And further replying to said paragraph two of said answer, plaintiff alleges that the bank, with intent to defraud the plaintiff and the defendant, Izella J. Smith, wrongfully and feloniously withheld from plaintiff and refused to deliver to him the said note and release of said mortgage, and also withheld from and refused to deliver to the defendant, Izella J. Smith, the said sum of \$1,296.00, or any part thereof, and wrongfully and feloniously held and represented the same to be assets of said bank, and plaintiff further alleges that the said note, release of mortgage, and said sum of \$1,296.00 in money, are now in the possession and under the control of

the defendant Clinton A. Snowden, as receiver of said bank.

WHEREFORE, plaintiff asks judgment as prayed for in his complaint herein.

B. A. CROWL,
Attorney for Plaintiff.

(Verification.)

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 11, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [18]

**Stipulation for Substitution of Parties Defendant
and Attorneys for Defendant.**

It appearing that Clinton A. Snowden has resigned from the receivership of the United States National Bank of Centralia, and that A. R. Titlow, formerly attorney for the receiver, has been duly appointed by the Comptroller of the Currency receiver of the United States National Bank of Centralia, it is stipulated between the parties hereto that A. R. Titlow, as Receiver of the United States National Bank of Centralia, be and he is hereby substituted as a party defendant in this cause in the place and stead of Clinton A. Snowden, and that Bausman, Oldham & Goodale are substituted for A. R. Titlow as the attorneys for the receiver and for the bank.

Dated this 13th day of April, 1915.

B. A. CROWL,

Attorneys for Plaintiff.

FREDK. BAUSMAN,

R. P. OLDHAM, and

R. C. GOODALE,

Attorneys for the Receiver and for the United States
National Bank.

It is so ordered.

Done in open court this 22 day of April, 1915.

JEREMIAH NETERER,

Judge.

[Endorsed]: Filed in the U. S. District Court,
Western District of Washington, Southern Division.
Apr. 23, 1915. Frank L. Crosby, Clerk. By F. M.
Harshberger, Deputy. [19]

[Title of Court and Cause.]

**Notice of Filing Defendant Receiver's Proposed
Statement of Evidence.**

To John E. Sundquist, Plaintiff, B. A. Crowl, His
Attorney: Izella J. Smith, Defendant, and
Messrs. Vance & Parr, Her Attorneys, and
Walter Gustafson, Defendant.

You and each of you will please take notice that
we have on this 2d day of August, 1915, lodged in
the office of the clerk of the above-named court for
your examination the statement of the evidence here-
in proposed by the defendant A. R. Titlow, Receiver
of the United States National Bank to be included
in the record on appeal in this cause.

AND YOU WILL PLEASE TAKE NOTICE that on the 16th day of August, 1915, at 10 o'clock A. M. at the courthouse of the above-named court in Tacoma, Washington, we will ask the court or Judge to approve the statement hereinbefore mentioned, a copy of which is herewith served upon you.

BAUSMAN, OLDHAM & GOODALE,
Solicitors for the defendant, A. R. Titlow, Receiver
of the United States National Bank of Cen-
tralia.

We hereby admit service of the above notice and acknowledge the receipt of a copy of defendant's proposed statement of evidence, this 2d day of August, 1915.

B. A. CROWL,
Solicitors for Complainant.

We hereby admit service of the above notice and acknowledge the receipt of a copy of defendant's proposed statement of evidence this 3d day of August, 1915.

HARRY L. PARR,
Solicitors for Defendant, Izella J. Smith. [20]

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Aug. 11, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [21]

Return on Service of Writ.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed Notice of Filing Proposed Statement of Evi-

dence on the therein named Walter Gustafson, by handing to and leaving a true and correct copy thereof with Walter Gustafson, personally, at Rochester, in said District, on the 3d day of August, A. D. 1915.

JOHN M. BOYLE,

U. S. Marshal.

By John T. Secrist,

Deputy.

Marshal's Fees, \$2.00. [22]

[Title of Court and Cause.]

Statement of Testimony Proposed by Defendant A. R. Titlow, Receiver of the United States National Bank of Centralia.

FREDERICK BAUSMAN, R. P. OLDHAM and R. C. GOODALE, Attorneys for A. R. Titlow, as Receiver of the United States National Bank of Centralia.

[Testimony of John E. Sundquist, on Behalf of Plaintiff.]

JOHN E. SUNDQUIST, the plaintiff, was called as a witness in his own behalf and testified as follows:

That he resided at Centralia and resided there in August, 1914; that he had met the defendant Izella J. Smith; that he had Three Thousand Dollars (\$3,000.00) deposited in the United States National Bank of Centralia, for which he had been issued three certificates of deposit of One Thousand (\$1,000.00) each; that on August 31, 1914, he went to the bank with Walter Gustafson to pay a note

secured by mortgage for Twelve Hundred Dollars (\$1200.00) principal, with Ninety-six (\$96.00) interest which Gustafson owed to Miss Smith.

“That at that time he cashed two of the certificates, receiving Six Hundred Four (\$604.00) Dollars in cash and a receipt for Twelve Hundred Ninety-six (\$1296.00.) Dollars to pay off the note and mortgage held by Izella J. Smith. Counsel for complainant then handed the witness a receipt which the witness identified as the receipt for \$1296.00 referred to. It was then offered and admitted in evidence and marked “Plaintiff’s Exhibit A.”

The Receipt reads as follows:— [23]

Plaintiff’s Exhibit “A”—Receipt of U. S. National Bank to Plaintiff.

“Centralia, Wash., 190—.

Received from John E. Sundquist Twelve Hundred ninety-six Dollars A/c Mortgage Walter Gustafson to Izella J. Smith \$1200.00 & Int. 96.00

C. S. GILCHRIST, V. P.

\$1296.00”

It was admitted by counsel for the defendants that C. S. Gilchrist was the vice-president and manager of the bank.

Plaintiff further testified that both he and Walter Gustafson went to the bank a few times afterwards and asked about the note; that the note and mortgage never were delivered to him or to Gustafson and were never cancelled; that the bank did not pay the mortgage off; that he never got back the \$1296.00.

Counsel for complainant here stated, in response to a question from the Court, that there was nothing in

the pleadings to show that the mortgage and note were payable at any particular place.

The witness further testified that Mr. Gilchrist said that the note and mortgage were going to be paid off right away, as quick as the bank got the mortgage.

On cross-examination the witness testified that he had on August 31, 1914, and for a good while prior thereto, Three Thousand Dollars (\$3,000.00) on deposit with the United States National Bank in the form of certificates of deposit—three certificates for One Thousand Dollars (\$1,000.00) each.

Counsel for the receiver here handed the witness two certificates which were identified by the witness as two of the three certificates for \$1,000.00 each. These two cancelled certificates were offered in evidence and marked Defendant's [24] Exhibits Nos. 1 and 2. A copy of them is as follows:

Defendant's Exhibit No. 1—Certificate of Deposit.

THE UNITED STATES NATIONAL BANK.

Centralia, Wash., July 6-1914, No 5776.

JNO. E. SUNDQUIST has deposited in this Bank One Thousand Dollars, (\$1000.00) Payable to the order of Self—on return of this certificate properly endorsed, with interest, at the rate of 3 or 4 per centum per annum if the same be left undisturbed for 6 or 12 months from date. Interest ceases at the

expiration of 12 months.

ROSS W. DAUBNEY,
U. S. NATIONAL BANK. G Cashier.
Not subject to Check.

(Endorsed) :

“The United States National Bank,
Centralia, Wash.

PAID

Aug 31 1914.”

JNO. E. SUNDQUIST.”

Defendant's Exhibit No. 2—Certificate of Deposit.

THE UNITED STATES NATIONAL BANK.

Centralia, Wash. July 6/1914 No. 5775.

JNO. E. SUNDQUIST has deposited in this Bank One Thousand Dollars \$1000.00 Payable to the order of Self—on return of this certificate properly endorsed, with interest, at the rate of 3 or 4 per centum per annum if the same be left undisturbed for 6 to 12 months from date. Interest ceases at the expiration of 12 months.

ROSS W. DAUBNEY,
U. S. National Bank G Cashier.
Not subject to check.

(Endorsed]: “THE UNITED STATES NATIONAL BANK, Centralia, Wash. PAID Aug. 31, 1914.”

JNO. E. SUNDQUIST. [25]

The witness further testified that he had filed a proof of claim with the receiver for Eleven Hundred Dollars (1100.00). That on August 31st I took up the two \$1,000.00 certificates and took another certificate for \$100.00 and got Six Hundred Four Dol-

lars in cash and another certificate of \$1,296.00 for Izella J. Smith, making a total sum of \$3,000.00, including the other \$1,000.00 certificate. The certificate for \$1,296.00 in favor of Izella J. Smith was to be left with the bank on deposit for her; that he instructed Mr. Gilchrist to issue this certificate and hold it for Izella J. Smith; that he had never seen the certificate for \$1,296.00 to Izella J. Smith until the day of the trial, and had never had it in his possession.

This certificate was then admitted in evidence and marked Defendant's Exhibit No. 4, copy of which is as follows:

Defendant's Exhibit No. 4—Certificate of Deposit.

THE UNITED STATES NATIONAL BANK.

Centralia, Wash. Aug 31, 1914. No. 12215

Izella J. Smith has deposited in this Bank Twelve Hundred Ninety-six Dollars, \$1296.00 payable to the order of herself—on return of this certificate properly indorsed.

U. S. National Bank.

J. W. DAUBNEY, Cashier.

Not subject to check.

(In pencil) from Walter Gustafson.

Counsel for plaintiff excepted to its introduction in evidence and exceptions allowed.

[Testimony of Walter Gustafson, for Complainant.]

WALTER GUSTAFSON was produced as a witness on behalf of the complainant and testified that he was the defendant Walter Gustafson; that he was present on or about August 31st at the transaction

(Testimony of John E. Sundquist.)

with the bank which Mr. Sundquist had just testified to; that he came in and saw Mr. Gilchrist; that he [26] wanted to pay off the mortgage to Mrs. Smith of Olympia; that he asked Mr. Gilchrist, "Can I send it from this bank and she can draw the money at the Olympia Bank"? That Mr. Gilchrist replied, "Yes, if we release the mortgage in a proper way she would receive the money"; that Complainant's Exhibit "A" was the receipt which he got that day; that Mr. Charlie Gilchrist wrote it; that the certificate which is Defendant's Exhibit No. 4 for \$1296.00, payable to the order of Izella J. Smith, and not delivered to the witness at that time; that he was indebted to Izella J. Smith at that time in the sum of Twelve Hundred Dollars (\$1200.00).

On cross-examination, the witness testified that he had never seen exhibits No. 1 and 2 before; that Mr. Sundquist didn't take any money down to deposit it in the bank that day; that he already had money there on deposit to the amount of Three Thousand Dollars; that he had three certificates of One Thousand Dollars each; that he took two of them and cancelled them and got one for \$1296.00 for Izella J. Smith; that the bank gave Mr. Sundquist another certificate of deposit for \$100.00 and also gave him \$604.00 in cash; that the witness had never seen the certificate for \$100.00 or the other certificate for \$1000.00 before; that Mr. Sundquist at that time did not tell Mr. Gilchrist to hold that certificate of deposit for Mrs. Smith; that the witness said to Mr. Gilchrist that he wanted to pay off the mortgage and

(Testimony of John E. Sundquist.)

asked Mr. Gilchrist if they could send the money, \$1296.00, through the bank down to the Olympia bank; that Mr. Gilchrist said when she released the mortgage off the property she could get her money; that the witness said, "this man is going to furnish the money," referring to Mr. Sundquist; that Mr. Gilchrist gave Mr. Sundquist \$604.00 in cash and \$1296.00 on a certificate of deposit, and took another \$100.00 certificate of deposit that there was cash to [27] be sent to pay off the mortgage; that the money was deposited for a special purpose to pay off the mortgage which was to be paid off as soon as Miss Smith sent the mortgage; that Mr. Sundquist didn't take any money down there and put it into the bank that day.

On redirect examination the witness testified that he had never seen the certificate of deposit marked as Exhibit No. 4 before.

On being recalled for further examination the witness testified that he was a defendant in this case and had not put in any answer; that he did not claim any interest in the money against his father-in-law, Mr. Sundquist; that it was Mr. Sundquist's money.

[Testimony of Izella J. Smith, for Complainant.]

IZELLA J. SMITH was called as a witness on behalf of the complainant and testified that she was one of the defendants; that at the time of this transaction the defendant Walter Gustafson was indebted to her in the principal sum of Twelve Hundred Dollars (\$1200.00) and Ninety-six Dollars (\$96.00) interest; that she received notice from the United

States National Bank in writing that money was there to pay that; that she received it through the mail at Olympia.

Counsel for complainant here offered the notice in evidence after proper identification by the witness and it was admitted over the defendant receiver's objection on the ground that the letter was not competent evidence, marked Plaintiff's Exhibit B and reads as follows:

Plaintiff's Exhibit "B"—Notice.

"No. 8736.

THE UNITED STATES NATIONAL BANK

Capital Stock \$100,000.00.

Chas. Gilchrist, Pres.

C. S. Gilchrist, V. Pres. [28]

Geo. Dysart, V. Pres.

J. W. Daubney, Cashier.

Ross W. Daubney, Asst. Cashier.

H. F. Gilchrist, Asst. Cashier.

Centralia, Wash.

September Fourth, Nineteen Fourteen.

Izella J. Smith,

Olympia, Wash.

Dear Madam:

Mr. Walter Gustafson of Rochester has deposited \$1296.00 with us to pay a certain note and mortgage held by you. We would ask that you forward the same direct to us with a proper release and we will be pleased to be of service in effecting settlement.

Very truly yours,

C. S. GILCHRIST,

Vice-President.

The witness further testified that upon the receipt of this notice she went to the Olympia National Bank where she was a depositor and asked them if they would attend to the matter for her; that she sent the note and the release of the mortgage through the Olympia National Bank; that she had never received any money; that the note and release had never been returned to her; that she had sent a satisfaction along with the mortgage.

It was here admitted by counsel for the receiver that Mr. Gilchrist had signed the latter and the receipt.

On cross-examination the witness testified that she had filed an answer in the case; that she claimed no interest in the fund in controversy; that the Centralia Bank had never acted for her in the transaction; that she never had anything to do with them and never authorized them to do anything for her. The plaintiff then rested. [29]

[Testimony of C. S. Gilchrist, on Behalf of the Defendant Receiver.]

C. S. GILCHRIST was called as a witness on behalf of the defendant receiver and testified that he was the vice-president of the United States National Bank of Centralia and was familiar with the transactions in this matter; that Mr. Sundquist had on deposit with the bank some \$3000.00 as evidenced by three certificates of deposit of \$1000.00 each; that on August 31st Mr. Sundquist with his son-in-law Gustafson came to the bank and presented two certificates for \$1000.00 each and asked that the bank pay him \$604.00 in cash and execute a new certifi-

(Testimony of C. S. Gilchrist.)

cate for \$100.00 and stated that there was a note and mortgage executed by his son-in-law Gustafson to Miss Smith at Olympia amounting to \$1296.00 principal and interest. That the witness supposed at the time from the conversation that took place that the mortgage was payable at Centralia; that plaintiff said to them that he wanted to deposit this \$1,296.00 for Miss Smith until such time as the note and mortgage were sent over there with the proper release and that this was done; that the witness then executed the receipt which had been offered in evidence showing that that was a deposit of the \$1,296.00 in question; that the certificate of deposit for \$1,296.00 in favor of Miss Smith was made out immediately by the cashier of the bank at the direction of the witness; that Mr. Sundquist did not on the 31st day of August or at any time thereafter deposit any money in the United States National Bank and brought none in on that day; that all he did was to change the form of credit—change the two certificates to this \$1,296.00 certificate of deposit, \$100.00 certificate of deposit and take \$604.00 in cash.

On cross-examination the witness testified that certificates of deposit were frequently paid by cancellation and renewal; that he didn't know that these particular ones were renewed. [30] That he did not give the certificate of deposit of Izella J. Smith to Mr. Sundquist; that he did give him the receipt for \$1,296.00 marked Plaintiff's Exhibit "A"; that the deposit for \$1,296.00 was made by Gustafson, or rather by Sundquist, in the manner which he had tes-

tified; that he wrote the letter marked Plaintiff's Exhibit "B" to Miss Smith and that the money was there for that purpose.

On redirect examination the witness testified that no additional money was brought there; that the money transfer was made as directed by Mr. Sundquist and Mr. Gustafson together; that when he spoke of the money being left he meant that the money credit was there which she could draw at any time; that there was no money paid in by plaintiff that day—that it was simply a transfer of evidence of credit; that there was that amount of money in the bank at that time and up to the time it closed.

On recross-examination the witness testified that there was between Twenty Thousand and Thirty Thousand Dollars in the bank, as he remembered it in cash when the bank closed; that it was his understanding that the note and mortgage together with the certificate of deposit for \$1,296.00 were still in the bank.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Aug. 2, 1915. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. [30½]

[Title of Court and Cause.]

Order Approving Statement of Evidence.

This matter regularly came on for hearing at ten A. M., August 16, 1915, pursuant to notice duly served by the defendant receiver upon all other parties hereto more than ten days before that date. At that time the parties being represented by their re-

spective counsel in open court, it was duly continued by the Court to August 23, 1915, at ten A. M.

Now, on this last-named date, I, Edward E. Cushman, Judge of the above-entitled court, and the judge before whom the above case was tried, do hereby certify, the plaintiff and the defendant being represented by their respective counsel in open court, that the foregoing is a true and complete statement of all the evidence essential to the decision of the case, presented by the appeal of the defendant receiver from the judgment entered herein in favor of the plaintiff. That the foregoing statement is true, complete and properly prepared, and I do hereby approve the same as the statement of the evidence in said matter for the purpose of said appeal, and do hereby order that the same become a part of the record for the purpose of the appeal.

EDWARD E. CUSHMAN,

Judge. [31]

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Aug. 23, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [32]

Decree.

This cause came on regularly for hearing upon the issues presented by the pleadings, on the 9th day of February, 1915, the plaintiff appearing in person and by his attorney, B. A. Cowl, the defendant, Clinton A. Snowden, Receiver of the United States National Bank of Centralia, appearing by his at-

torney, A. R. Titlow, and the defendant, Izella J. Smith, appearing in person and by her attorney, Harry L. Parr, and the defendant, Walter Gustafson, appearing in person, and the said defendants, Izella J. Smith and Walter Gustafson, having in open court disclaimed and waived any and all interest in the money alleged by plaintiff to be a special deposit in the hands of said Receiver, and the Court having heard the evidence introduced by the plaintiff and the defendant, Clinton A. Snowden, as Receiver of said United States National Bank of Centralia, and having duly considered the same together with the pleadings, records and files herein, and having heard and considered the arguments of respective counsel, and it appearing to the Court, that on or about the 31st day of August, 1914, the plaintiff, John E. Sundquist, deposited in said United States National Bank of Centralia, Washington, the sum of \$1,296.00 in lawful money of the United States under an express contract and agreement with said bank that said sum of money should be by said bank applied in payment of a certain promissory note and mortgage, said note and mortgage being for the principal sum of \$1,200.00, and the remaining sum of \$96.00 being for interest thereon, said note and mortgage being made and executed by the said defendant, Walter Gustafson, payable to the order of the defendant, Izella J. Smith, and at said time owned and held by said defendant, Izella J. Smith, and that at said time it was [33] agreed by and between the plaintiff and said bank that said \$1,296.00 should be paid to said defendant, Izella J.

Smith, in satisfaction of said mortgage and discharge of said debt and not for any other purpose; that said bank failed and neglected to pay said money, or any part thereof, to said Izella J. Smith, and retained and held the same and the whole thereof until said bank became insolvent on or about the 21st day of September, 1914, at which time Francis A. Chapman was appointed Receiver of said bank and as such Receiver obtained possession and control of all of the property and assets of said bank, including said sum of \$1,296.00 deposited by the plaintiff; that thereafter, the defendant Clinton A. Snowden succeeded the said Francis A. Chapman as Receiver of said bank, and came into possession, and is now in possession of all of said property and assets, including said sum of \$1,296.00 deposited by the plaintiff; and it further appearing to the Court that the said deposit of \$1,296.00 made by the plaintiff was, and is, a special deposit and trust fund in said bank and in the hands and possession of said Receiver, and that the plaintiff is entitled to the same;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the plaintiff, John E. Sundquist, do have and recover of and from the defendant, Clinton A. Snowden, Receiver of the United States National Bank of Centralia, the sum of \$1,296.00 in lawful money of the United States, together with plaintiff's costs and disbursements herein taxed at \$51.15;

IT IS FURTHER ORDERED, that the said defendant, Clinton A. Snowden, Receiver of the said United States National Bank of Centralia, be, and

he is hereby ordered and directed to forthwith pay to the said plaintiff, John E. Sundquist, the [34] said sum of \$1,296.00, together with plaintiff's costs and disbursements herein, out of the funds now in his hands as Receiver of the said bank.

Done in open court this 15th day of February, A. D. 1915.

EDWARD E. CUSHMAN,
Judge.

Deft. excepts. Exception allowed.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Service by receipt of copy of within hereby acknowledged this 11th day of February, 1915.

A. R. TITLOW,
Attorney for Defendant, Clinton A. Snowden.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 15, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [35]

Stipulation (as to this Suit Being One in Equity).

It is hereby stipulated by and between the parties hereto that the above-entitled cause is a suit in equity, that it was so begun and has been so regarded by both plaintiff and defendants throughout the course of the litigation, and was tried as such, and that it may be regarded as an equity cause for purposes of appeal.

Dated this 29th day of March, 1915.

B. A. CROWL,

Solicitor for Plaintiff.

FREDK. BAUSMAN,

R. P. OLDHAM and

R. C. GOODALE,

Solicitors for Receiver and United States National
Bank of Centralia.

[Endorsed]: Filed in the U. S. District Court,
Western Dist. of Washington, Southern Division.
Apr. 23, 1915. Frank L. Crosby, Clerk. By F. M.
Harshberger, Deputy. [36]

[Title of Court and Cause.]

**Certificate (of Acting Comptroller of the Currency)
Directing Appeal.**

To A. R. Titlow, Receiver of the United States Na-
tional Bank of Centralia:

You are hereby directed to appeal to the Circuit
Court of Appeals for the Ninth Circuit from the
judgment of the District Court for the Western Dis-
trict of Washington, Southern Division, entered in
the above-entitled cause on February 15th, 1915.

Witness the Honorable THOMAS P. KANE,
Acting Comptroller of the Currency, this —— day of
August, 1915.

T. P. KANE,

Acting Comptroller of the Currency.

[Endorsed]: Filed in the U. S. District Court,
Western Dist. of Washington, Southern Division.

Aug. 16, 1915. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. [37]

[Title of Court and Cause.]

Assignment of Errors.

Now on this 2d day of August, 1915, comes the defendant, A. R. Titlow, Receiver of the United States National Bank of Centralia, substituted for Clinton A. Snowden as such receiver and defendant herein, by his solicitors, Frederick Bausman, R. P. Oldham and R. C. Goodale, and says that the decree entered in the above cause on the 15th day of February, 1915, is erroneous and unjust to him:

I.

Because the plaintiff has no interest in the subject matter of this litigation, the alleged rights which he is attempting to assert belonging, if to any one, to the defendant Izella J. Smith.

II.

Because the District Court erred in finding and adjudging that the change of the form of credit from a certification of deposit in favor of the plaintiff to a certificate in favor of the defendant Izella J. Smith without the deposit of any actual money was a sufficient basis for the assertion of a preferred claim against the assets of the bank in the hands of the defendant receiver.

III.

Because the District Court erred in ordering and directing the receiver of the United States National Bank to forthwith pay to the plaintiff the sum of

\$1,296.00 together with plaintiff's costs and disbursements out of the funds then in his hands as receiver of the United States National Bank. [38]

IV.

Because the District Court erred in rendering a decree in favor of the plaintiff which decree is contrary to the testimony and against the law because the equity of the case entitled the defendant receiver of the United States National Bank to a decree of dismissal.

WHEREFORE the defendant A. R. Titlow, Receiver of the United States National Bank of Centralia prays that the decree be reversed and the District Court directed to dismiss the bill and for such other relief as the defendant receiver is entitled to in equity.

FREDERICK BAUSMAN,
R. P. OLDHAM,
R. C. GOODALE,

Solicitors for Defendant A. R. Titlow as Receiver of
the United States National Bank of Centralia.

[Endorsed]: Filed in the U. S. District Court,
Western Dist. of Washington, Southern Division.
Aug. 2, 1915. Frank L. Crosby, Clerk. By E. C.
Ellington, Deputy. [39]

[Title of Court and Cause.]

Petition for Appeal.

Comes now A. R. Titlow, Receiver of the United States National Bank of Centralia, substituted for Clinton A. Snowdon as such Receiver, and defendant

herein, feeling himself aggrieved by the final decree entered in the above-entitled court and cause on the 15th day of February, 1915, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors which is filed herewith and prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers, upon which said decree was based duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting in San Francisco, California.

BAUSMAN, OLDHAM & GOODALE,
Attorneys for Petitioner.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington. Aug. 2, 1915. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. [40]

[Title of Court and Cause.]

Order Allowing Appeal.

The above-named defendant A. R. Titlow, Receiver of the United States National Bank of Centralia, having heretofore filed his assignment of errors and petition for appeal from the final decree herein, and it appearing that the defendant has been directed by the Comptroller of the Currency of the United States of America to take such appeal; now, therefore, it is hereby

ORDERED that the petition for appeal be granted and the appeal is hereby allowed.

Dated this 2d day of August, 1915.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed in the U. S. District Court,
Western Dist. of Washington, Southern Division.
Aug. 2, 1915. Frank L. Crosby, Clerk. By E. C.
Ellington, Deputy. [41]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return, that the foregoing pages numbered from 1 to 41 inclusive, contain a full, true and correct transcript of the record and proceedings in the case of John E. Sundquist vs. A. R. Titlow, Receiver of the United States National Bank of Centralia, Walter Gustafson and Izella J. Smith, No. 1693, lately pending in this court, as required by the praecipe of counsel filed in said cause, as the originals thereof appear on file in this court at the City of Tacoma, in the District aforesaid.

I further certify and return that I hereto attach and herewith transmit the original Citation, and original Order extending time for record on appeal.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office, by and on behalf of the appellant herein, for making the rec-

ord, certificate and return to the United States Circuit Court of Appeals, for the Ninth Circuit, in the above-entitled cause, to wit:

Clerks fees (Sec. 828 R. S. U. S.) for making
 record, certificate and return, 83 folios @
 15¢ ea.....\$12.45
 Certificate of Clerk to transcript, 3 fo. @ 15¢
45
 Seal to said Certificate..... .20

ATTEST my hand and the seal of the United States District Court for the Western District of Washington, at Tacoma, [42] this 1st day of September, A. D. 1915.

[Seal]

FRANK L. CROSBY,
 Clerk.

By E. C. Ellington,
 Deputy Clerk, [43]

Return on Service of Writ.

United States of America,
 Western District of Washington,—ss.

I hereby certify and return that I served the annexed Citation on the therein named Walter Gustafson, by handing to and leaving a true and correct copy thereof with Walter Gustafson, personally at Rochester, Washington, in said District on the 3d day of August, A. D. 1915.

JOHN M. BOYLE,
 U. S. Marshal.

By John T. Secrist,
 Deputy.

Marshal's Fees, \$7.30. [44]

*In the District Court of the United States for the
Western District of Washington, Southern Di-
vision.*

IN EQUITY—No. —.

JOHN E. SUNDQUIST,

Plaintiff,

vs.

A. R. TITLOW, Receiver of the United States Na-
tional Bank of Centralia, WALTER GUS-
TAFSON and IZELLA J. SMITH,

Defendants.

Citation on Appeal—(Original).

United States of America to John E. Sundquist,
Complainant, and Walter Gustafson and Izella
J. Smith, Defendants, Greeting:

You are hereby notified that in the above-entitled proceeding had in the United States District Court for the Western District of Washington, Southern Division, an appeal has been allowed to the defendant A. R. Titlow as Receiver of the United States National Bank of Centralia to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree entered in said cause, and you are therefore hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, in the State of California, within thirty days from the date of this citation, to show cause, if any there be, why the said final decree appealed from should not

be corrected and speedy justice done the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States this 2d day of August, A. D. 1915.

[Seal]

EDWARD E. CUSHMAN,

Judge. [45]

Due service of the foregoing citation admitted this 2d day of August, 1915.

B. A. CROWL,

Solicitor for Plaintiff John E. Sundquist.

Due service of the foregoing citation admitted this 3d day of August, 1915.

HARRY L. PARR,

Solicitor for Defendant Izella J. Smith.

[Endorsed]: In Equity. No. ——. In the District Court of the United States for the Western District of Washington, Southern Division. John E. Sundquist, Plaintiff, vs. A. R. Titlow, Receiver of the United States National Bank of Centralia, Walter Gustafson and Izella J. Smith, Defendants. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Aug. 11, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

**[Order Extending Time to File Record on Appeal
and Docket Case.]**

*United States Circuit Court of Appeals, for the
Ninth Circuit.*

No. 1693.

A. R. TITLOW, as Receiver for the United States
National Bank of Centralia,

Appellant,

vs.

JOHN E. SUNDQUIST, WALTER GUSTAFSON
and ISELLA J. SMITH,

Respondents.

Now, on this 23d day of August, 1915, upon motion
of Bausman, Oldham & Goodale, attorneys for the
defendant and appellant, A. R. Titlow, Receiver of
the United States National Bank of Centralia, and
for good cause shown, it is

ORDERED that the time within which the appel-
lant is required to file the record on appeal herein
and docket the case with the clerk of the above-named
court at San Francisco, California, be and it is here-
by enlarged to and including the 1st day of October,
1915.

EDWARD E. CUSHMAN,
District Judge.

O. K.—B. A. CROWL,
Atty. for Plff. [46]

[Endorsed]: #1693. United States Circuit Court
of Appeals for the Ninth Circuit. A. R. Titlow, Re-
ceiver, Appellant, vs. John E. Sundquist et al., Re-

spondents. Order Extending Time for Filing Record. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Aug. 28, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

[Endorsed]: No. 2652. United States Circuit Court of Appeals for the Ninth Circuit. A. R. Titlow, as Receiver of the United States National Bank of Centralia, Washington, Appellant, vs. John E. Sundquist, Walter Gustafson and Izella J. Smith, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed September 15, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

A. R. TITLOW, as Receiver of the
UNITED STATES NATIONAL
BANK of Centralia, Washington,
Appellant,

vs.

JOHN E. SUNDQUIST, WALTER
GUSTAFSON and IZELLA J.
SMITH,

Appellees.

Filed

FEB 16 1911

F. D. MORTON

BRIEF OF APPELLANT

Upon Appeal from the United States District Court
for the Western District of Washington,
Southern Division.

R. P. OLDHAM,
R. C. GOODALE,
Attorneys for Appellant.

1408 Hoge Building,
Seattle, Washington.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

A. R. TITLOW, as Receiver of the
UNITED STATES NATIONAL
BANK of Centralia, Washington,
Appellant,

vs.

JOHN E. SUNDQUIST, WALTER
GUSTAFSON and IZELLA J.
SMITH,
Appellees.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court
for the Western District of Washington,
Southern Division.

R. P. OLDHAM,
R. C. GOODALE,
Attorneys for Appellant.

1408 Hoge Building,
Seattle, Washington.

STATEMENT.

In August, 1914, John E. Sundquist was a depositor of the United States National Bank of Centralia in the amount of \$3,000. This deposit was evidenced by three certificates of deposit of \$1,000.00 each. (Tr. p. 20) Sundquist desired to pay a mortgage of \$1,296.00, which was owing from his son-in-law Gustafson to a Miss Smith. On August 31, 1914, Sundquist surrendered to the bank two of the certificates of deposit, receiving from the bank \$604.00 in cash, a certificate of deposit for \$100, and a receipt for \$1,296.00. (21)

As to the \$1,296.00, Sundquist instructed the bank to issue a certificate of deposit for that amount in favor of Miss Smith (24). Thereupon, the bank issued its certificate of deposit as follows (24):

“THE UNITED STATES NATIONAL BANK.

Centralia, Wash., Aug. 31, 1914. No. 12215

“Izella J. Smith has deposited in this Bank Twelve Hundred Ninety-six Dollars, \$1,296.00 payable to the order of herself—on return of this certificate properly indorsed.

U. S. National Bank.

J. W. DAUBNEY, *Cashier.*”

Not subject to check.”

The bank wrote Miss Smith that the sum had been deposited with it to pay the note and mortgage, and asked her to forward the note, mortgage, and satisfaction to the bank. (27) In response to this notification, Miss Smith sent the note, mortgage and satisfaction through the Olympia National Bank to the United States National Bank at Centralia. She never received the certificate of deposit and the note and the release of mortgage have never been returned to her. (28) There is no evidence that she ever demanded the return of the papers sent by her.

The United States National Bank of Centralia was declared insolvent by the Comptroller of the Currency on September 21, 1914, and the appellant Titlow, is its duly appointed and qualified receiver. (8) The \$1,296.00 as evidenced by the certificate of deposit has never been paid to Sundquist, Smith, or Gustafson. (30) This suit is brought by Sundquist to enforce preferential payment to him of \$1,296.00 out of the assets of the insolvent bank. (7)

SPECIFICATIONS OF ERRORS.

1. The plaintiff has no interest in the subject matter of this litigation, the alleged right which he is attempting to assert belonging, if to any one, to the defendant Izella J. Smith.

2. The District Court erred in finding and adjudging that the change in the form of credit from certificate of deposit in favor of the plaintiff to a certificate in favor of defendant Smith, without the deposit of any actual money, was sufficient basis for the assertion of a preferred claim against the assets of the bank in the hands of the defendant receiver.

3. The District Court erred in ordering and directing the receiver of the bank to pay to the plaintiff the sum of \$1,296, together with the costs and disbursements, out of the funds then in his hands as receiver.

4. The District Court erred in rendering a decree in favor of the plaintiff, which decree is contrary to the testimony and against the law, because the equity in the case entitled the defendant receiver to a decree of dismissal.

ARGUMENT.

A national bank fails. Its depositors cannot be paid in full. The bank has wronged *all depositors*. Its creditors frequently assert that their claims are entitled to preference. This is based upon the theory of a trust fund held by the receiver which does not belong to the *general* creditors. If the preference is

to be allowed, it must come out of the fund for distribution among the other creditors. Congress has recognized the desire of claimants to be paid in full at the expense of others. It recognizes also the maxim that equality is equity, and has intended to prevent all unjust preferences. Sec. 6236 provides for "ratable dividends upon all claims proved to the satisfaction of the Comptroller or adjudicated in a court of competent jurisdiction." Sec. 5242 prohibits all attempts by the bank to prevent a just and ratable distribution of the assets among the creditors. If, however, by reason of any established equitable principle, a claimant is entitled to a fund in the hands of the receiver, it should be paid in full. This doctrine is based upon the theory that the receiver is in possession of funds equitably belonging to the claimant.

Where a claimant has made a deposit in a bank which subsequently becomes insolvent, his claim for preference is usually based upon one of two grounds: *First*. That the deposit was made for a specific purpose without the right of the bank to commingle his deposit with other funds of the bank; and, *second*, that the deposit was received by the bank when it was known to be hopelessly insolvent. We are not concerned with the second principle as the question of the solvency or insolvency of the Centralia bank at the time of the transaction is not involved in this case.

In order to entitle the claimant to a preference on the first ground, it is necessary for him to establish (a) that there *was* a trust fund created by his deposit, and (b) that this trust fund can be followed *into the possession of the receiver, and that the assets of the insolvent bank are augmented thereby.*

* Many of the courts have failed to recognize the distinction that before a trust fund can be *traced*, a trust fund must *exist*. Your Honors recognized this principle when you said, in *Spokane County vs. First National Bank of Spokane*, 68 Fed. 979:

“There is no recognized ground upon which equity can pursue a fund and impose upon it the character of a trust except upon the theory that the money is still the property of the plaintiff. If he is permitted to follow it and recover it, it is because it is his own, whether in the form in which he parted with its possession or in a substituted form.”

NO TRUST FUND.

Originally the bank owed Sundquist \$3,000.00, evidenced by three certificates of deposit. At the time of the transaction of August 31, 1914, no *additional money* was deposited by Sundquist with the bank. There was a *mere shifting of the credits already existing* by a changing of the credit of

\$3,000.00 by (a) withdrawal of \$604.00 cash; (b) the retention of one certificate of deposit of \$1,000.00; (c) the issuing of a new certificate for \$100.00 to Sundquist; and (d) a new certificate of deposit for \$1,296 in favor of Izella J. Smith, which certificate was payable to the order of herself "on return of this certificate properly indorsed."

We are immediately impressed with the fact that the net result of this transaction was *to decrease the assets of the bank to the extent of the withdrawal of the cash, \$604.00*. After August 31, instead of owing \$3,000.00, *the bank owed somebody only \$2,396.00*. Nor do we resort to any fiction wherein a depositor actually withdraws cash and *redeposits* it to the credit of some one else. No money passed over the counter of the bank *except the actual withdrawal of the \$604.00 cash by Sundquist*. No money was counted, no funds were set aside; it was a mere matter of bookkeeping, whereby the new certificate of deposit for \$1,296 was issued by the bank. It is evident that prior to the transaction of August 31, Sundquist was a creditor of the bank. He is not asserting any preference claim for the \$1,000 evidenced by the certificate of deposit issued to him prior to August, 1914, nor even for the new certificate of \$100.00 issued to him on August 31st. This \$1,100.00 he has asserted as a general claim. (23) But

he asserts that the shifting of the credit and the issue of the new certificate for \$1,296.00 changed the relation of debtor and creditor and constituted the bank his bailee, and that so far as *that certificate* is concerned, Sundquist is entitled to a preferential claim. Of what fund did the bank thereupon become bailee? No specific coin was set apart, no funds were earmarked. It was never contemplated that any identical separate money should be forwarded to Miss Smith. A bailee, like an agent, has possession of a specific res. If he wrongfully deals with this res of his bailor or principal, he is guilty of a conversion. What specific \$1,296.00 would it have been possible for the bank to convert to its own use?

In *Marine Bank vs. Fulton Bank*, 2 Wall. 252, the court said:

“All deposits made with banks may be divided into two classes, namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter, and that other kind of deposit of money peculiar to banking business, in which the depositor, for his own convenience, parts with his title to the money and loans it to the banker, and the latter, in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount, or any part thereof, on demand. The case before us is not that of the former class. It must be of the latter.”

The mere shifting of credit, or the change in form of an existing credit, does not change the relation from debtor and creditor to trustee and cestui que trust.

In *Hawkins vs. Cleveland C. A. & St. L. Ry. Co.*, 89 Fed. 266, C. C. A., 7th Cir., the railroad company had a deposit of some \$50,000 with the bank. Desiring one Haughey to become surety on certain bonds on behalf of the Railroad Company, and in order to protect Haughey against any liability on account of his undertaking, it was agreed between the railroad and the bank that \$18,000 of the \$50,000 deposit should be set aside for that purpose. This was done by the Railroad Company drawing a check on its deposit of \$50,000, which was redeposited to the credit of Haughey, Trustee. Thereupon the bank issued its certificate of deposit, reciting that the Railroad Company had made a special deposit of \$18,000 in the bank in the name of Haughey, Trustee, to secure him as surety on a bond. The liability on the bond having terminated and the bank in the meantime having become insolvent, the railroad company brought suit against the receiver of the bank, asserting a preferential claim as to this \$18,000, on the ground that it was a special deposit or bailment to be held by the bank. That court said:

“If, as contended by its counsel, the bank remained simply a debtor for the \$18,000, as well after

as before the transfer of the credit from the appellee to Haughey, Trustee, then Haughey, Trustee, would not be entitled to a preference over other creditors, nor would appellee or any other person, merely because it or he sustained to Haughey, Trustee, the relation of beneficiary, be entitled to a preference. * * * We think the bank remained after as before the deal a debtor for the \$18,000. The credit was changed from the account of one depositor to that of another. The receiver is answerable only for the distributive share appropriate to any balance owing from the bank on the account of Haughey, Trustee, without preference and as a general creditor."

In *Anhaueser-Busch Brewing Association vs. Clayton*, 56 Fed. 759, it appeared that the Brewing Company drew its draft on one Morris and sent the draft to the McNab Bank for collection and return. Morris paid the draft *with his check on the McNab Bank*. Morris had at that time about \$3,000 to his credit as a depositor in the McNab Bank. The McNab Bank forwarded to the Brewing Company its exchange drawn on the Hanover National Bank of New York, which, being sent forward by the Brewing Company for collection in New York, was protested for non-payment, the McNab Bank having failed. A claim for priority of the protested draft was asserted by the Brewing Company against the insolvent bank. That court said:

"Accepting Morris's check in payment of his debt to the appellant (Brewing Company) and charging the amount of it on Morris's account with the bank, *was but a shifting of his liability*, and he

became appellant's debtor and assumed the obligation to pay to it the amount of the check less exchange. There is nothing to indicate that this amount was separated and kept unmingled with the bank's own money, but on the contrary, it is conceded that it is indistinguishable from the mass of the bank's own money and cannot be traced to and identified in the hands of the receiver. This being so, appellant has no better equity than the other creditors of the bank and is entitled to no priority over them."

In *Warren vs. Nix*, 135 S. W. 896, 97 Ark. 374, the court said:

"A deposit is therefore in law, as well as in fact, the placing or leaving with a banker a sum of money for safe keeping. If the agreement between the parties is that the identical coin or currency shall be laid aside and returned, then it is a special deposit, but if the agreement is that the money shall be returned, not in the specific coin or currency to the depositor, but in an equal sum, it is a general deposit. In either case the money is deposited for safe keeping, and the only distinction between the two kinds of deposit is the character of the return that is to be made thereof to the depositor, whether it shall be returned in the identical thing deposited or in kind."

The distinction between a general and a special deposit is universally recognized. As said in *Butcher vs. Butler*, 114 S. W. 564, 134 Mo. App. 61: "A general deposit is where the bank is given the custody of the money deposited with the intention, express or implied, that the bank is not to be required to return the identical money, but only its equivalent. In such cases the legal title to the money passes to

the bank, and the depositor, divested of his title, must rely on the obligation of the bank to repay him. In the case of a special deposit, the bank merely assumes the charge and custody of the property, without authority to use it, and the depositor is entitled to receive back the identical thing deposited. The title remains with the depositor, and if the subject be money, the bank has no right to mingle it with other funds.”

See also *Boyer vs. American Trust & Savings Bank*, 41 N. E. 622, 157, Ill. 62.

The court takes judicial notice of the customary dealings of banks and the handling of accounts. A bank is not like an ordinary agent entrusted with funds of its principal. It is not contemplated by the depositor that the *identical money* will be forwarded but that a like amount of coin or a credit will be utilized. (*Marine Bank vs. Fulton supra.*) By the shifting of the credit and the issuance of the certificate of deposit for \$1,296.00 it was neither the agreement expressed or implied that the bank should set aside that specific amount in coin. *The expressed agreement was directly to the contrary.* The certificate of deposit recited that it would pay Miss Smith or order that sum upon demand. This certificate was the promissory note of the bank to pay

out of the general mass of moneys in its possession either to the holder of the certificate or to her order.

If no trust fund in fact existed, it is not necessary to pursue further the question whether a trust fund once established can be traced into the hands of the receiver of the insolvent bank.

NO AUGMENTATION OF ASSETS.

One rule of almost universal application by the federal courts is that, in order to entitle a claimant to recover a trust fund in the hands of the receiver of an insolvent national bank, it must appear by *convincing proof that the funds actually coming into the hands of the receiver have been augmented by such trust fund*. Even if a trust fund at one time existed, it cannot be asserted against the bank's receiver unless it can be traced into his possession. The fund being lost, the claimant is relegated to the position of a general creditor.

This court said :

"In carrying out the rule (the one mentioned above) when it comes to proof, the owner must assume the burden of ascertaining and tracing the trust fund, showing that the assets which have come into the hands of the trustee *have been directly added to or benefited by an amount of money* realized from the sales of the specific goods held in trust. * * * We do not mean to be understood as holding that equity will grant to a cestui que trust relief against any assets in the hands of a trustee, for it will not go farther

than to give a lien when the facts are that there remain in the estate specific funds or property which have increased the assets of the estate and which represents the proceeds of the specific property entrusted to the bankrupt."

In re Acheson Co. 170 Fed. 427.

Again your Honors in *In re Dorr*, 196 Fed. 292, at page 98, said:

"Money due from a bankrupt as trustee and which cannot be distinguished from any other moneys in his possession or under his control, or which is due from him only because he has used trust funds for his own purposes, or otherwise misapplied them, cannot be considered as property held by the bankrupt in trust."

Citing cases.

The trust fund theory is based upon the principle that the assets in the hands of the receiver have been so increased that the allowance of the preference claim will not decrease the dividend to general creditors. If an augmentation of the insolvent's assets in the possession of the receiver has not occurred, the claimant is not entitled to a preference, for the simple reason that the allowance of the preferred claim would be at the expense of the general creditors.

In *Beard vs. Independent District Pella City*, 88 Fed. 375, the Circuit Court of Appeals for the 8th Circuit Court said:

“Unless it appears that the fund or estate coming into the possession of the receiver has been augmented or benefited by the wrongful use of trust funds, no reason exists for giving the owner of the trust fund a preference over the general creditors, and this we understand to be the doctrine recognized by the Supreme Court of Iowa and the Supreme Court of the United States.”

The facts in that case showed that the claim of the city to a trust fund of some \$4,000.00 grew out of two credits entered on the books of the bank, which credits did not represent actual cash paid into the bank, but *represented checks, given on the bank itself, the amount of each being charged on the books of the bank against the drawer of the checks and then entered to the credit of the treasurer of the school district.*

“This balance is made to appear to be due to the school district by entries upon the books *which neither increased nor diminished the cash held by the bank.*”

And it appeared that the amount of cash held by the bank was not increased by this transaction, but

“remained at just the figure it would have shown if the interchange of credits between the treasurer of Marion County and the treasurer of the school district had not taken place.”

Under these facts that court said:

“Can it be successfully maintained that the cash fund coming into the hands of the receiver has been augmented by the addition thereto of a trust fund be-

longing to the school district, which may be subtracted from the fund without infringing on the rights of the general creditors?"

"It is claimed in the argument that the court must treat the case just as though the treasurer of the school district had presented the check, had obtained the money therefor, and had then deposited the money in the bank as the money of the school district, *but this was not in fact done*, and against the creditors whose money in fact created the cash amount coming into the hands of the receiver, why should fiction be resorted to in order to sustain a preference on behalf of the school district to payment out of a fund not augmented in fact by any sum belonging to the district?"

"If the treasurer of the district had presented the check to the bank for acceptance, and it had been accepted or certified as good by the bank, but before payment the bank had failed, certainly if the school district desired to avail itself of a claim against the bank, it could only do so by assuming the position of its treasurer, which would be that of a creditor of the bank holding an accepted or certified check. It could certainly not assert that the accepted check had become a trust fund which must be paid in preference to the debts due other creditors. By accepting the check, the bank would bind itself for the payment of the amount thereof, and in effect that was all that was done in this case, in that when the check was drawn, the amount thereof was credited up to the account of the treasurer of the school district, and by so doing the bank acknowledged the check to be good and became bound to pay the amount thereof when called upon by the treasurer of the district."

"But where the district attempts to avoid the position of creditor and assume that of the owner of a trust fund, and as such to assert a preferential right

to payment in full out of the cash funds coming into the hands of the receiver to the detriment of the general creditors, it ought to be held to satisfactory proof of the fact upon which the right to a preference rests, to-wit, that the fund coming into the receiver's hands has been augmented and increased by the addition thereto of the trust money, not as a matter of inference, nor as a result of mere entries in books of account, but because the fund or property against which the preference is sought to be enforced has been in fact augmented or benefited by the addition thereto of the trust fund."

The *Beard* case has been frequently cited with approval. Judge Sanborn, in delivering the opinion of the same court in *Empire State Surety Co. vs. Carroll County*, 194 Fed. 593, at page 606, said:

"Proof that these checks augmented the cash that went into the hands of the receiver or that they produced cash which he obtained, was indispensable to any preference on their account. But checks of third persons on the bank with which they are deposited, which are paid by crediting the bank and charging the drawers on the books, fail to increase the cash in its possession and form no basis for a preferential payment to the depositor."

In *City Bank vs. Blackmore*, 75 Fed. 771 C. C. A. 6th Cir., a preferential claim of \$5,000 was sought against the Commercial Bank on the following facts. The City Bank was a depositor with the Commercial Bank. It deposited a draft on a firm in New York to its credit in the Commercial Bank, for \$5,000. The Commercial Bank forwarded this draft to its correspondent in New York, to which correspondent the

Commercial Bank was indebted. The Commercial Bank became insolvent. The correspondent New York Bank applied the draft on a balance owing from the Commercial Bank to it. The City Bank then claimed a preference against the receiver of the insolvent Commercial Bank. Judge Taft, in delivering the opinion of that court, said :

“The sole question is therefore whether the credit thus secured by the Commercial Bank and its receiver by the draft entitles the City Bank to take \$5,000 out of the assets held by the receiver. The question must certainly be answered in the negative in any view which can be taken, *unless it appears that the assets were increased \$5,000 by the credit, or that the claims against them were so decreased that there was \$5,000 more for distribution among those who remained creditors after the credit than there would have been had no credit been given to the Commercial Bank for the draft.* This does not appear. If no such credit had been allowed by the National Bank of the Republic, it merely would have been a claimant for \$5,000 more, and would have been entitled, not to \$5,000 in full, but only to pro rata dividends on that amount. The benefit to the general fund from the draft therefore is limited to the amount of dividends payable on \$5,000, and that amount the receiver has already allowed the City Bank. It has no ground for complaint, therefore. No authority has been cited to show that a claim founded on fraud is entitled to a priority over other claims. It is only where, by a rescission of the contract out of which the claim arises on the ground of fraud, that the specific thing parted with, or its proceeds, can be sufficiently identified to be returned, that fraud seems to give a priority of distribution. It may not be necessary to show earmarks upon the proceeds of the thing part-

ed with to justify such a remedy, *but it must at least appear that the funds in the hands of the receiver were increased or benefited by the proceeds, and the recovery is limited to the extent of this increase or benefit.*"

The same court, in *Board of Commissioners vs. Strawn*, 157 Fed. 49, said:

"This side of the rule is peculiarly sound when it is sought to obtain an advantage in the distribution of the assets of an insolvent national bank. So long as the claim to advantage is bottomed upon the fact that the receiver has received money or property into which the money of the claimant is shown to have come into the hands of the receiver are shown to have been augmented by the receipt of the trust fund or its actual proceeds, other creditors should not complain if that is returned to which neither the bank nor its receiver had any just title."

In that case it was admitted that a trust fund existed. The difficulty was in following it. Some of it was made up of mere items of bookkeeping, where credit was transferred from one depositor to the trust claimant, and did not involve any actual payment of money out of the funds of the bank. The right of preference was denied.

The Circuit Court of Appeals for the Second Circuit in *American Can Co. vs. Williams*, 178 Fed. 420, had this question before it. In the *Williams* case numerous claims were asserted as entitled to preference. Among these claims was the amount of certain drafts credited by the Fredonia Bank (after-

wards insolvent) to the claimant, but which drafts were paid by the drawee's check on the Fredonia Bank, it therefore amounting to a mere item of bookkeeping, whereby one depositor was charged with the amount of the draft and the claimant's deposit credited with a like amount, *there being no actual cash paid into the bank*. Right of preference was denied. That court said:

"If the plaintiff's contention be well founded, and to follow misappropriated moneys it is only necessary to show that a receiver has and the trustee had assets, the rule is simply that a demand for such moneys is a preferred claim against any substantial estate."

The decision of the lower court in this case is found in 176 Fed. 16. In speaking of the above transaction of debiting the drawees of the draft and the crediting of a like amount to the claimant, the lower court said:

"No money actually came into the bank's possession as the result of the payments of the drafts, and in each instance they were accepted by the drawee, whose deposits were correspondingly reduced. * * * * The general assets of the bank by the stated method of paying the drafts was not augmented or increased, and there was no addition thereto by debiting the drawees, between whom and the insolvent bank there existed debtor and creditor relations. Although the insolvent bank may have discharged its liabilities to such depositors, yet nothing tangible came to the receiver. His resources were not increased, and by such bookkeeping transferences nothing passed to him which was capable of being set apart or which could be identified."

See also *Peters vs. Bain*, 133 U. S. 670; *Lucas County vs. Jamison*, 170 Fed. 338.

Let us suppose that prior to August 1914 the bank had only three depositors, all of whom on the same day deposited and received certificates of deposit as follows: A, \$1,000; B, \$1,000; and Sundquist \$3,000; that thereupon Sundquist withdrew in cash \$604.00 and had left three certificates of \$1,000, \$100, and \$1,296 respectively; that then the bank fails, with total assets all in cash of \$1,500. Its total liabilities would be \$4,396, \$1,000 to A, \$1,000 to B, and \$2,396 to Sundquist. If Sundquist is entitled to a preference for the \$1,296, there will be only \$204 for distribution to general creditors, or \$68 to A, \$68 to B, and \$1,364 to Sundquist. A and B are both innocent parties, without fault, but by allowing Sundquist's claim in full, A and B would be deprived of a fund to which they are equitably entitled upon the ratable distribution of the insolvent's assets. True the bank wronged Sundquist, but it wronged all its depositors. It did not fulfil its promise to pay the amount of their deposits on demand.

BURDEN OF PROOF.

From what has been said, it will appear that the burden of proof of establishing and tracing a trust fund is on the claimant. The certificate for \$1,296

was issued by the bank on August 31. The record is silent *as to what cash was in the bank at that time* or at any other time up to September 21, when the bank failed. The only evidence as to cash in bank at the date of failure was that of Mr. Gilchrist, who testified that there was between \$20,000 and \$30,000 in the bank, as he remembered it, when the bank closed (30). There is no attempt to trace this supposed trust fund into any other asset than cash. There is no showing that there was maintained in the vaults of the bank *a sum equal to or in excess of \$1,296 from August 31 to September 21*. There is no showing but what in the interval between those dates the cash balance in the bank was nothing. *The burden of establishing the fund, showing that it was maintained and finally passed into the hands of the receiver, is upon the plaintiff.*

In the *Beard* case it was said that it could not be established "as a matter of inference." The testimony in favor of the claimant must be *clear and convincing*. In *In re Brown*, 193 Fed. 24, there was an attempt by the claimant to trace a trust fund of some \$1,000. It was shown that the fund which came into the trustee's hands as unexpended was over \$2,000. The referee had found that the "opening and closing balances in the Hanover Bank on and after August 13 were largely in excess of these (two deposits)."

The Circuit Court of Appeals, however, page 26, said that this finding was not sufficient.

“There is no reason why it should be *assumed* that these balances were being reserved because they represented trust money of the Princeton Bank rather than because they represented trust money of Simpson or Scrotton, or any of the other similarly situated claimants enumerated above, or indeed any of the other claimants who from time to time have appeared in this proceeding seeking to trace and recover the property converted by the bankrupts. Moreover, it is not enough to show that there were morning and afternoon balances for several successive days large enough to cover the amount of money which was improperly converted. It might very well be that in any one day checks were presented which exhausted the morning balance and its accretions, in which event these moneys would have been dissipated. We are not prepared to assent to a proposition that subsequent deposits are to be taken as having been made to make good claimant’s money thus drawn and spent. Board of Commissioners vs. Strawn, 157 Fed. 51. Our own conclusion would be that the \$1,757.50 of proceeds of the claimant’s stock which went into the Hanover Bank on August 13 has not been shown to be any part of the balance which was turned over by the bank to the trustee on September 5. * * * Surely there can be no presumption, *in the absence of testimony* and in the face of these other claims, that \$1,757.50 of the balance was claimant’s money.”

That court concluded as follows:

“The burden of proof is on the claimant at the outset. It rests upon him at the close of the case.”

The *Brown* case was affirmed in the Supreme Court of the United States, sub nom *Schuyler vs. Lit-*

tlefield, 232 U. S. 707. In discussing the question of the burden of proof, the Supreme Court said:

“Like all other persons similarly situated, they (the claimants) were under the burden of proving their title. If they were unable to carry the burden of identifying the fund as representing the proceeds of their Interborough stock, their claim must fail. If their evidence left the matter of identification in doubt, that doubt must be resolved in favor of the trustees, who represents all of the creditors of Brown & Company, some of whom appear to have suffered in the same way. Like them the appellants must be remitted to the general fund.”

FORM OF DECREE.

It is submitted that the form of decree in this case is objectionable. It provides for a money judgment in favor of Sundquist against the Receiver (33), and directs the Receiver to "forthwith pay" Sundquist the sum of \$1,296.00 with costs and disbursements (34).

Denton v. Baker, 79 Fed., 189, C. C. A. 9th Cir.

See also *Richardson v. Louisville Banking Company*, 94 Fed., 442, C. C. A., 5th Cir.

In conclusion there could hardly be presented to the court a simpler case than the one at bar for the disallowance of a preferential claim. In order to create a special deposit it would be necessary to resort to mere bookkeeping entries and disregard the *facts*. To establish a trust fund in the possession of this receiver belonging to Sundquist it would be necessary to assert a doctrine that every creditor of an insolvent bank has a lien in *all* its assets for the security of his claim, a doctrine without authority in any Circuit in this country.

Respectfully submitted,

R. P. OLDHAM,

R. C. GOODALE,

Attorneys for Appellant.

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UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

A. R. TITLOW, as Receiver of the
UNITED STATES NATIONAL
BANK OF CENTRALIA, WASH-
INGTON,

Appellant,

vs.

JOHN E. SUNDQUIST, WALTER
GUSTAFSON, and IZELLA J.
SMITH,

Appellees.

No. 2652.

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WEST-
ERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION.

Brief for Appellee John E. Sundquist

B. A. CROWL,
Solicitor for the Appellee
John E. Sundquist.

Bank of California Building, Tacoma, Washington.

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NOTE:—All page references, when not otherwise designated, are to printed transcript. The name “Sundquist” and word “Appellee” mean the appellee John E. Sundquist.

STATEMENT.

The record shows that on the 31st day of August, 1914, the appellee, John E. Sundquist, plaintiff below, had on deposit in the United States National Bank of Centralia the sum of \$3,000.00, for which he held three certificates of deposit, each for the sum of \$1,000.00 (Tr. p. 20). That on said 31st day of August, 1914, he went to the bank and cashed two of the certificates (Tr. p. 21), which he surrendered to the bank and which were at said time endorsed, “Paid Aug. 31, 1914,” and said endorsement signed, “Jno E. Sundquist” (Tr. pp. 22-23).

In payment of the two cancelled certificates (Deft’s Ex. 1 and 2; Tr. pp. 22-23,) he received from the bank \$604.00 in money and a certificate of deposit for \$100.00, leaving the remaining sum of \$1296.00 with the bank with instructions to apply the same in payment of a note for \$1200.00, with \$96.00 interest, held by Izella J. Smith, which note was secured by a mortgage (Tr. p. 21-25). The bank accepted the money for the purpose stated and, as evidence of the nature of the deposit, executed

and delivered to Sundquist a receipt as follows (Tr. p. 21) :

“Plaintiff’s Exhibit ‘A’—Receipt of U. S. National Bank to Plaintiff.

Centralia, Wash., 190—.

Received from John E. Sundquist Twelve Hundred ninety-six dollars a/c mortgage Walter Gustafson to Izella J. Smith \$1200.00 and Int. \$96.00.

C. S. GILCHRIST, V. P.
\$1296.00.”

Four days after above transaction, to-wit, September 4th, 1914, the bank wrote Miss Smith as follows (Tr. p. 27) :

“Plaintiff’s Exhibit ‘B’—Notice.

No. 8736.

THE UNITED STATES NATIONAL BANK

Capital Stock \$100,000.00.

Chas. Gilchrist, Pres.

C. S. Gilchrist, V. Pres.

Geo. Dysart, V. Pres.

J. W. Daubney, Cashier.

Ross W. Daubney, Asst. Cashier.

H. F. Gilchrist, Asst. Cashier.

Centralia, Wash.

September Fourth, Nineteen Fourteen.

Izella J. Smith,

Olympia, Wash.

Dear Madam:

Mr. Walter Gustafson of Rochester has deposited \$1296.00 with us to pay a certain note and mortgage held by you. We would ask that

you forward the same direct to us with a proper release and we will be pleased to be of service in effecting settlement.

Very truly yours,

C. S. GILCHRIST,
Vice-President."

In response to this notice, Miss Smith at once caused the note and a release of the mortgage to be sent to the bank, but she never received any of the money and the note and release of the mortgage were never returned to her. Miss Smith testified as a witness in the case that she claimed no interest in the fund in controversy (Tr. p. 28).

The C. S. Gilchrist whose name is subscribed to the above receipt and letter to Miss Smith, and who represented the bank in the transaction with Mr. Sundquist, was at all said times the Vice-President of the bank (Tr. p. 21).

After making the deposit on August 31st, Sundquist called at the bank several times in regard to the matter, but never received the note nor release of the mortgage, and the money was never returned to him (Tr. p. 21).

At the time of the transaction with the appellee (Sundquist), to-wit, on August 31st, 1914, and at all times thereafter, to and including September 21st, 1914, there was sufficient cash in the bank to pay the \$1296.00 deposit in controversy, and on the last named date, at which time the bank closed,

there was on hand between \$20,000 and \$30,000 in cash (Tr. p. 30).

On the 21st of September, 1914, the bank having become insolvent, a receiver was appointed by the Controller of the Currency, who on said date took possession of all of its assets and affairs, including the \$1296.00 deposit in controversy, claiming the same to be part of the general funds or assets of the bank (Tr. pp. 8-9-33).

In addition to the receipt (Pltff's Ex. A) for \$1296.00, given Sundquist on August 31st, 1914, a certificate of deposit bearing same date and for the same amount was introduced in evidence by the appellant, which reads as follows (Tr. p. 24):

“Defendants’ Exhibit No. 4—Certificate of
Deposit.

Centralia, Wash. Aug. 31, 1914. No. 12215.

Izella J. Smith has deposited in this bank
Twelve Hundred Ninety-six dollars, \$1296.00,
payable to the order of herself—on return of
this certificate properly indorsed.

U. S. National Bank.

J. W. DAUBNEY, Cashier.

Not subject to check.

(In pencil) from Walter Gustafson.”

This certificate, however, was never issued, but remained in the possession of the bank, and was never delivered to either Sundquist or Izella J. Smith, nor seen by either of them (Tr. pp. 24-30).

The appellee, John E. Sundquist, brought this action to recover the \$1296.00 as a special deposit.

ARGUMENT.

The appellee submits to this Court the foregoing statement for the reason that the statement in appellant's brief is incomplete, in that it does not include what, in our opinion, are the vital and controlling facts in the case, and gives undue prominence to comparatively immaterial matters, and is therefore unfair and misleading.

We assume that the conclusions of fact reached by the District Judge, as shown by the decree entered in the court below, will be accepted by this court as conclusive in so far as the same are not contradicted by undisputed evidence contained in the record, and that therefore, where the abstract is not convincing, or the testimony conflicting, the findings of the trial court will be given the weight usually accorded to verdicts of juries in like cases.

In its final decree herein, the lower court held (Tr. pp. 32 and 33):

“ * * * that on or about the 31st day of August, 1914, the plaintiff, John E. Sundquist, deposited in said United States National Bank of Centralia, Washington, the sum of \$1296.00 in lawful money of the United States under an express contract and agreement with said bank that said sum of money should be

by said bank applied in payment of a certain promissory note and mortgage, said note and mortgage being for the principal sum of \$1200.00, and the remaining sum of \$96.00 being for interest thereon, said note and mortgage being made and executed by the said defendant, Walter Gustafson, payable to the order of the defendant, Izella J. Smith, and at said time owned and held by said defendant, Izella J. Smith, and that at said time it was agreed by and between the plaintiff and said bank that said \$1296.00 should be paid to said defendant, Izella J. Smith, in satisfaction of said mortgage and discharge of said debt and not for any other purpose; that said bank failed and neglected to pay said money, or any part thereof, to said Izella J. Smith, and retained and held the same and the whole thereof until said bank became insolvent on or about the 21st day of September, 1914, at which time Francis A. Chapman was appointed Receiver of said bank and as such Receiver obtained possession and control of all of the property and assets of said bank, including said sum of \$1296.00 deposited by the plaintiff; that thereafter, the defendant Clinton A. Snowden succeeded the said Francis A. Chapman as Receiver of said bank, and came into possession, and is now in possession of all of said property and assets, including said sum of \$1296.00 deposited by the plaintiff; and it further appearing to the court that the said deposit of \$1296.00 made by the plaintiff was, and is, a special deposit and trust fund in said bank and in the hands and possession of said Receiver, and that the plaintiff is entitled to the same. It is therefore ordered, etc."

The controlling question in this case is, Was this \$1296.00 deposit in controversy, made by John E. Sundquist and accepted by the United States National Bank of Centralia under an agreement, or with the understanding, that the money should be applied in payment of the note and mortgage held by Izella J. Smith? If the money was left in the bank under an agreement of that kind, then the deposit was special and the money is not an asset of the bank in the hands of the receiver.

The witnesses who testified to the conversation between Gilchrist, vice-president of the bank, and Sundquist, at the time the deposit was made, all say that Sundquist told Mr. Gilchrist that he wanted the \$1296.00 applied in payment of the note and mortgage held by Izella J. Smith, and that Mr. Gilchrist accepted the money upon that condition and agreed to apply it as directed (Tr. pp. 20 to 30, inclusive).

The agreement between them is further shown by the receipt given Sundquist (Pltff's Ex. A; Tr. p. 21), and the notice by the bank to Miss Smith that the money had been deposited for the purpose of paying the note and mortgage held by her, and asking her to send note and release of mortgage (Pltff's Ex. B; Tr. p. 27).

The receipt is a written contract between the bank and Sundquist, and, when considered in con-

nection with the letter to Miss Smith, conclusively establishes the fact that the bank received the money as a special deposit under an express contract to apply the same in payment of the note and mortgage held by Miss Smith.

As to whether the deposit in controversy was general or special, and upon the question of the conclusiveness of the receipt given the depositor, the case of *Carlson vs. Kies*, 75 Wash. 171, is directly in point. In that case the Supreme Court of Washington says:

“Desiring to hold the money until the return of proper vouchers which he had forwarded to them, he placed the money in the Commercial Bank, and received from it a receipt therefor, written at his instance and signed by the cashier, as follows:

‘Vancouver, Wash., Dec. 14, 1910. 190.

‘Received from Fred Olson Three Thousand seventy and 60-100 Dollars, to be held until receipts are received from heirs. Then same to be forwarded by bank draft.

G. W. DANIELS,
Cashier.’

(Margin) The Commercial Bank, Vancouver, Wash.’ ”

“* * * A deposit in a bank is either general or special. Where a general deposit is made, it is either credited to the account of a depositor subject to his check or evidenced by a demand or time certificate. The title to the deposit in such cases passes to the bank

and it becomes the debtor of the depositor. On the other hand, when a bank accepts a special deposit, it becomes a trustee of the depositor and holds the money subject to the trust. *The receipt itself affords strong, if not conclusive evidence, of a special deposit. It shows that the money was placed in the bank for a special purpose.* Fortified by the evidence of the depositor and the admitted circumstances here present, it is obvious that both parties to the transaction intended to make a special and not a general deposit. It follows, therefore, that the bank holds the money, not as a general debtor, but in a fiduciary capacity."

Among the cases relating to special deposits as affected by receipts and certificates of deposit are the following:

In the case of *Woodhouse vs. Crandall*, 64 N. E. Rep. 292 (Ill.), \$1500.00 was deposited in the bank and a receipt given the depositor, reciting that the fund was to be held for the period of one year as security for the faithful performance of the conditions of a certain lease. The bank, as in this case, made out a certificate of deposit, which was never delivered to anyone, reciting that the money was payable on return of the certificate properly endorsed. It was held that the receipt specified the terms and conditions of the deposit and showed it to be for a special purpose, and that the certificate of deposit was a mere memorandum by the bank to distinguish and identify the fund; it in no man-

ner affected the contract of the parties as shown by the receipt.

Another state case in which a certificate of deposit was given is *Shopert vs. Indiana National Bank*, 83 N. E. Rep. 515 (Ind.). The depositor placed money in the bank under an agreement that the bank should pay it to a third person, provided a machine the third person had sold to the depositor complied with the warranty after ten days' trial. The agreement between the parties was oral, but one of the officers of the bank received the money and wrote a certificate of deposit in the presence of the depositor, but the depositor did not see the certificate or know anything of its contents. The certificate was in the usual form payable to the third person on "return of this certificate properly endorsed," with the addition of the following words: "provided husker fills guaranty after ten days' trial." This certificate was placed in an envelope and retained by the bank. The husker was unsatisfactory and was returned; the bank failed and the receiver claimed the money as part of the general funds of the bank; held, a special deposit and not the property of the bank.

In their statement of the case and argument, counsel for appellant entirely ignore the receipt given Sundquist, and the letter to Miss Smith, apparently preferring to rely upon certain answers

of Sundquist on cross-examination, relating to an alleged certificate of deposit, which was never issued (Tr. p. 24).

Considering the entire testimony of Sundquist, both direct and cross-examination (Tr. pp. 20 to 24), and also the testimony of Gustafson (Tr. pp. 24 to 26) and Gilchrist (Tr. pp. 24 to 30), we think it is evident the words "receipt" and "certificate of deposit" mean one and the same thing to him. In fact it may be said that a certificate of deposit is always a receipt, and in this particular instance the one introduced in evidence (Tr. p. 24. Deft's Ex. 4), is nothing but a receipt. It recites that "Izella J. Smith has deposited in this bank \$1296.00 payable to the order of herself" (which is not true), and then goes on to say that the money would be paid to her upon return of the certificate, etc. How could Miss Smith return it to the bank when it was never in her possession and she had no knowledge of its existence? This precious document was probably carefully locked up in the bank with the note, mortgage and release of mortgage and the \$1296.00 belonging to Sundquist, and is now brought to light for the first time for the purpose of this suit.

In this copy of this alleged certificate of deposit in favor of Miss Smith, as set out in appellant's statement of the case, the pencil notation, "from Walter Gustafson," is omitted (Tr. p. 24; App.

brief p. 1). We now ask counsel to explain to this court why a *true* copy was not given, including the notation. In presenting copies of written instruments, true and complete copies should be given, and questions of materiality left to the court. The notation tends to sustain our contention that the deposit was there for the special purpose of paying the note and mortgage of Gustafson held by Miss Smith.

NEW CONTRACT NOT CHANGE OF CREDIT.

Appellant assumes as a basis for the argument presented in his brief, that the transaction between Sundquist and the bank was simply a change or transfer of credit,—a mere matter of bookkeeping; that a general deposit of \$2000.00 to his (Sundquist's) credit was changed by giving him \$604.00 in cash and a certificate of deposit for \$100.00, and crediting Izella J. Smith with \$1296.00. The contention that Miss Smith was given credit for this money is wholly without foundation, as there is not a particle of evidence in the record to sustain the assertion. In a number of places in their brief, counsel for appellant refer to the certificate of deposit "issued to Miss Smith." The only certificate issued to her was the written notice from the bank that \$1296.00 had been deposited to pay the Gustafson note and mortgage held by her and asking her to send release of mortgage. The cer-

tificate appellant refers to as creating a credit in favor of Miss Smith was never issued to anybody and did not make her a creditor of the bank. How can there be a change of credit without a creditor?

When the bank paid Sundquist \$2000.00 for its two negotiable certificates of deposit (and it is estopped to deny payment), its outstanding obligations were reduced by that amount and also the cash on hand to the same extent. With the surrender and cancellation of the certificates, the relation of debtor and creditor between the bank and Sundquist terminated as to this particular two thousand, and a new contract was necessary if he again became a creditor. The \$1296.00 was left with the bank as bailee for the special purpose of paying the note and mortgage held by Miss Smith; \$604.00 was retained by Sundquist, and he again became a creditor to the amount of the \$100.00 certificate. The title to and ownership of the \$1296.00 would remain in Sundquist until the surrender to him and cancellation of the note and mortgage. It is idle to talk about a transfer of credit when the fund in controversy could not, under the conditions of the bailment, be credited to any person, but had to be applied in payment of the note and mortgage. It therefore necessarily follows that the wrongful commingling of this money with the general funds of the bank, whether by the officers of the bank or the receiver, has aug-

mented the cash assets in the hands of the receiver in the sum of \$1296.00.

Counsel for appellant have cited and quoted numerous authorities in support of their contentions that in the case at bar the transaction between the bank and Sundquist merely transferred a general credit of \$1296.00 in favor of Sundquist to a general credit in favor of Miss Smith, and that therefore no trust fund in fact existed. But, the record shows conclusively that an express contract of bailment was entered into between the bank and Sundquist, by the terms of which the \$1296.00 became a special deposit and trust fund and not a general credit in favor of Miss Smith. The cases cited by appellant are, therefore, not in point and we consider further reference thereto unnecessary.

Under the sub-title "Burden of Proof," counsel for appellant in their brief say (p. 220):

"From what has been said, it will appear that the burden of proof of establishing and tracing a trust fund is on the claimant. The certificate for \$1296.00 was issued on August 31. The record is silent *as to what cash was in the bank at that time* or at any other time up to September 21, when the bank failed. The only evidence as to cash in bank at date of failure was that of Mr. Gilchrist, who testified that there was between \$20,000 and \$30,000 in the bank, as he remembered it, when the bank closed. There is no attempt to trace

this supposed trust fund into any other asset than cash. There is no showing that there was maintained in the vaults of the bank a sum equal to or in excess of \$1296.00 from August 31 to September 31."

That such an assertion as the foregoing should be made, in the face of the uncontradicted testimony as shown by the record, is, to say the least, surprising. It is not the only misrepresentation of fact on the part of appellant, and while we believe it is all unintentional and inadvertant, the fact remains that each and all of the erroneous statements favor the appellant. In regard to the above statement as to the funds in the bank, the vice-president of the bank, C. S. Gilchrist, testified as follows (Tr. p. 30):

"That there was that amount of money in the bank at that time and up to the time it closed."

Upon the erroneous assumption that there was no showing as to the amount of cash in the bank from date of deposit to closing of the bank, counsel for appellant proceed to cite authorities to the effect that such showing was necessary. We deem further discussion of this matter unnecessary.

In their citation of authorities in support of their contentions in this case, counsel for appellant have apparently carefully avoided the decisions of this Court. We think these decisions and the authorities

therein referred to cover all of the questions presented by this appeal, and we will therefore confine our citations to those cases.

In *Merchants National Bank v. School District No. Eight*, 94 Fed. 707, in considering the contention that no money was ever actually deposited with the insolvent bank, this court said:

“It is contended that the finding of the master, to the effect that Palmer deposited with the bank the sum of \$13,056, is at variance with the facts as they are disclosed in the evidence. It appears from the evidence that the bonds were sold in Boston, and that the sum realized thereon was deposited with the National City Bank of Boston, which bank was the correspondent of the Helena bank. The Boston bank notified the Helena bank that that amount had been placed to the credit of the latter by a letter which was received by the bank at Helena on July 11, 1896. On July 3rd the Helena bank had with the Boston bank a credit of \$39,011.60, against which it drew on that day the sum of \$10,000, leaving a balance of \$29,011.60, which was not further reduced until July 13th, when a draft for \$8,075 was drawn against it. On July 11, 1896, the Helena bank gave the personal account of Palmer a credit on its books of the full amount of the proceeds of the sale of the bonds. Thereupon Palmer gave the bank his personal check for \$13,056, and requested that an account be opened as found by the master. Upon these facts it is contended that the money which was realized on the sale of the bonds was never actually deposited with the Helena bank. It is not ma-

terial in this case whether it was actually so deposited or not. It is undisputed that the money belonged to the school district, and that it was deposited with the bank's correspondent in Boston, and that, upon the receipt of intelligence of such deposit, the Helena bank opened the account, and entered into the agreement which was indicated in the findings of the master. The Helena bank, if it had not then the money in its actual possession, had it under its control, and could lawfully, in the due course of banking, have paid it over to Palmer or to the school district. Instead of so paying the money, it chose to enter into the arrangement which was consummated."

We desire to direct particular attention to the latter part of above decision:

"The Helena bank, if it had not then the money in its actual possession, had it under its control, and could lawfully, in the due course of banking, have paid it over to Palmer or the School District. Instead of so paying the money, it chose to enter into the agreement which was consummated."

So in this case, the United States National Bank of Centralia could have paid in cash to Sundquist the entire \$2000 evidenced by the paid certificates of deposit, but instead of so doing it chose to enter into the contract for the special deposit of \$1296.00 of said sum. It is entirely immaterial that the record does not show that the \$2000 was actually counted out and touched by Sundquist. Counsel for appellant contend that a depositor in a National

bank cannot use any part of the funds in his general account with the bank for the creation of a special deposit, unless he actually receives the cash from the bank, counts the same, goes out of the bank, turns around (whether once or twice is not stated), comes back and makes the special deposit. Our theory of the transaction is that by express contract between the parties—the bank and Sundquist—a trust fund was created for the purpose of paying the note and mortgage held by Miss Smith; that the bank assumed the duty of executing the trust, and that the receiver as its representative is bound thereby, and in support of that view we refer to the case of *Montague v. Pacific Bank*, 81 Fed. Rep. 605, in which this court said:

“In *People v. City Bank of Rochester*, 96 N. Y. 32, the principal facts were these: The City Bank of Rochester had discounted certain notes for the firm of Sartwell, Hough & Ford, a depositor with it, and that firm, wishing to anticipate the payment of these notes, gave to the bank its checks for the amount of the notes, less rebate of interest, which checks the bank received, and charged in the firm account, and entries were made in the bank books to the effect that the notes were paid. The firm at the time supposed that the bank held the notes, but they had in fact been previously sold by it. Before the notes became due, the bank failed; and in an action brought by the attorney general in the name of the people a receiver was appointed of its property and effects. The firm made an application to the

court, requiring the receiver to pay the notes out of the funds in his hands. This was finally granted, and an appeal was thereupon taken. Danforth, J., after stating the facts as above, said:

‘The transaction in question was not between the bank and Startwell, Hough & Ford in their relation of debtor and creditor, nor in their relation of bank and depositor. The object of the latter was to provide a fund for the payment of specific notes, and the engagement of the former was to apply that fund to such payment. Thus a trust was created, the violation of which constituted a fraud by which the bank could not profit, and to the benefit of which the receiver is not entitled. (Citing *Libby v. Hopkins*, 104 U. S. 303; *in re Le Blanc*, 14 Hun. 8, affirmed 75 N. Y. 598.)

* * * The checks of the petitioner were money assets in the hands of the bank, and were so treated by all parties. They were delivered to it with explicit directions to apply the proceeds on payment of the notes. Those directions were assented to by the bank officer, and the checks collected from the general fund. From that moment the bank was bound to hold the money for, and apply it to, that purpose, and no other, or, failing to do so, return it to the petitioner. As to it, the bank was bailee or trustee, but never owner. It is estopped from saying that all this is a matter of bookkeeping. It assumed a duty, and the receiver, as its representative, is bound by it. Nor does this obligation at all depend, as the appellant seems to suppose, upon the question when, where, and to whom the notes were to be paid. Whether presently or in the future is immaterial. The specific object for

which the fund was created was the payment of the notes, and its character does not depend upon those incidental circumstances. The checks were impressed with a trust, and no change of them into any other shape could divest it so as to give the bank or its receiver any different or more valid claim in respect to them than the bank had before the conversion'."

By entering into the contract, which the uncontradicted testimony shows was entered into with Sundquist, the bank admitted that it at that time received from Sundquist and had in its possession that specific sum, and the bank and its receiver are estopped from denying that such was the fact; and when it is once shown that a trust fund has been created, and a sum equal to it is found in the bank, it is presumed that the sum in the bank represents the trust fund; if that amount of money was not in fact in the vaults of the bank between the date of the deposit and failure of the bank, that fact might, perhaps, be set up by way of defense, but under the pleadings in this case it is not an issue.

Moreland v. Brown, 86 Fed. Rep. 259; C. C. A. 9th Circuit.

Montague v. Pacific Bank, *supra*.

Merchants National Bank v. School District No. Eight, *supra*.

Carlson v. Kies, 75 Wash. 177, *supra*.

Massey v. Fisher, 62 Fed. Rep. 958.

FORM OF DECREE.

Under above caption, counsel in their brief contend that the form of the decree entered in this case is objectionable, in that it provides for a money judgment in favor of Sundquist against the Receiver to forthwith pay Sundquist the sum of \$1296.00 with costs and disbursements.

The record shows that this \$1296.00 was the property of Sundquist; that the fund came into the hands of the Receiver when he entered into possession of the bank and its affairs; that this particular fund was not assets in the hands of the Receiver for ratable distribution, but belonged to Sundquist, and that it was the duty of the Receiver to deliver the same to Sundquist.

Scott v. Armstrong, 146 U. S. 499;

Corn Exchange Bank v. Blye, 4 N. E. Rep. 635.

What other form of decree could the Court render than one directing the delivery to Sundquist of his property? The cases cited by appellant have no application to the facts in this case. The Receiver came into possession of this fund, to which he never had any right or title, on the 21st of September,

1914, and is still in possession of it. As this is an equitable case, we think the appellee is not only entitled to the immediate possession of his property, with costs and disbursements, but also to interest on the principal—\$1296.00—from the 21st of September, 1914, until paid.

Respectfully submitted,

B. A. CROWL,

Solicitor for Appellee John E. Sundquist.

In the United States
Circuit Court of Appeals

For the Ninth Circuit

A. R. TITLOW, as Receiver of the UNITED
STATES NATIONAL BANK of Centralia, Wash-
ington,

Appellant,

vs.

JOHN E. SUNDQUIST, WALTER GUSTAFSON
and IZELLA J. SMITH,

Appellees.

PETITION FOR REHEARING

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DIS-
TRICT OF WASHINGTON, SOUTHERN DIVI-
SION.

R. P. OLDHAM,

R. C. GOODALE,

Attorneys for Appellant.

1408 Hoge Building, Seattle, Washington.

United States Circuit
Court of Appeals

FOR THE NINTH CIRCUIT

A. R. TITLOW, as Receiver of the UNITED
STATES NATIONAL BANK of Centralia, Wash-
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Appellant,

vs.

JOHN E. SUNDQUIST, WALTER GUSTAFSON
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PETITION FOR REHEARING

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DIS-
TRICT OF WASHINGTON, SOUTHERN DIVI-
SION.

The amount involved in this suit is small. The
facts are simple.

The legal principle is important.

You have declared a trust against an insolvent
estate on the admitted facts that there was (a) no
trust *res*, and (b) no augmentation of the estate.

You rest this decision on *Montagu vs. The Bank*, 81 Fed. 602. The facts in the Montagu case *are not similar*.

In the case at bar the *fact is no new money was deposited in the bank*. It owed Sundquist \$3,000. He withdrew part of this in cash and took a new evidence of indebtedness for the balance. There was no deposit of money by Sundquist or any one else. Your Honors have stated the facts concisely, but you have *commented* upon these facts as follows:

“Manifestly the \$1296 *left* by Sundquist with the bank, of which the appellant is receiver, to be paid over to Mrs. Smith upon her cancellation of the note and mortgage, executed by her to Gustafson, was not of the latter character, but, on the contrary, was *deposited* with the bank for that specific purpose.”

This statement, we believe, is not justified by the facts.

In the Montagu case there was a *deposit of actual funds*. *There was an augmentation of assets that passed to the receiver*. Let us see.

On June 21st London deposited \$5000 in New York to the credit of San Francisco, with instruction to San Francisco to remit it to Seattle. On June 22 San Francisco failed, not having made the remittance. *It was admitted* that the \$5000 *deposited and actually*

paid in New York had not been used in balancing accounts, but *was owing to the receiver of San Francisco*. What was the trust *res*? What was the augmentation? It was the *claim* that the receiver of San Francisco had against New York, to-wit, \$5000. When the San Francisco receiver collected the \$5000, there was an augmentation of assets of the insolvent San Francisco bank to that extent. This Montagu case is explained in 11 Harvard Law Review, 202:

“The decision is sound but the reasoning is erroneous, arising from a misconception of the trust *res*. The specific deposit lost its identity as a *res* by being mixed with the funds of the bank of deposit (New York) but as soon as C. (San Francisco) was credited with the amount by the bank of deposit, the former had a claim as a creditor—a common law claim—against the latter. This claim was not extinguished by any actual payment, because as the report expressly states, no funds were transmitted from B. to C. (New York to San Francisco). Nor does it appear from the facts that it was extinguished by any settlement on the books of the bank. The brief interval between the date of deposit and the failure and the general custom of banking would be quite conclusive that there was no such settlement. This unsatisfied claim would be held in trust for the depositor, who did not affect it by any subsequent withdrawals against it. The form of a trust *res* may change and the trust relation remain or a new trust *res* may come into existence during the course of events. The failure to distinguish its form and changes has caused great confusion in the cases. A similar correct result but similar confusion of reasoning characterizes the case of *Farley vs. Turner*, 26 Law J. Ch. 710, cited in the principal case

as directly in point. The foregoing reasoning avoids resort to the authority of cases where the assets of a bank are swollen by the intermixture of trust funds, many of which are cited in the principal case."

In the *Montagu* case let us suppose that *after* the crediting by New York for San Francisco and *after* the failure of San Francisco and before any actual payment by New York to San Francisco, New York had also failed and had paid 50 cents on the dollar. Would Your Honors have held that the complainant was entitled to a preferred claim of \$5000 or \$2500? Clearly the complainant could only receive as a preferred claim the *amount that the San Francisco receiver obtained from New York*.

This distinction of reasoning is clearly expressed in *Commercial National Bank vs. Armstrong*, 148 U. S. 50.

In that case a Cincinnati bank was acting as agent for a Philadelphia bank in the collection of various items. While this agency relation existed the Cincinnati bank failed and various phases of these collections were presented. The Cincinnati bank had sent some of these collection items to its correspondent banks. In some instances the correspondent bank had collected and credited *but not remitted* to the Cincinnati bank *before its failure*. Remittance was made

to the Cincinnati bank's receiver *after* its insolvency. In that class of cases the court held that the receiver was a trustee of the *claim against the subagent*. The Court said:

"It (the Cincinnati bank) had not fully performed its duties as agent and collector. It had *not received the moneys collected by its subagents as separate and specific funds, and therefore the plaintiff was entitled to have them paid out of the assets in the hands of the receiver, for when he collected them from these subagents, he was in fact collecting them as agent of the principal.*"

Where the Cincinnati bank had made the collection *before* insolvency no preferred claim was allowed.

The Supreme Court had in mind the language in the *Marine Bank* case and quotes the very passage that Your Honors have quoted in the *Sundquist* case.

Your Honors state that it is unnecessary to again cite the authorities relied upon by this Court in the *Montagu* case. Let us examine them. The first is *Peak vs. Elliott*, 30 Kas. 156. Judge Gilbert, in *Spokane County vs. First National*, 68 Fed. 979, quoted from the *Peak* case and stated that it among others laid down a doctrine to which *this Court was unable to give assent*.

The same Court that decided the *Peak* case later repudiated it.

Kansas State Bank vs. First National Bank, 62 Kas. 788, 64 Pac. 634, in speaking of the *Peak* case, the Court said:

“In that case the matter of identifying and tracing the trust fund received but little attention”; and after citing the earlier Kansas cases the Court continued:

“In some of the cited cases the doctrine of the impressibility of insolvent estates with trusts was carried to the full length, and language is used which taken apart from the facts of the case might give countenance to the rule that if the trust fund had been used by the trustee even in payment of his general indebtedness and without increasing the estate which passed to his assignee, it would be sufficient to charge the whole estate with the trust.”

The Kansas Court concluded that:

“If the estate had not been *increased by specific additions to it or if what previously existed had not been improved or rendered more valuable, it has not been impressed with the trust claimed.*”

The cases of *Massey vs. Fisher*, 62 Fed. 958, *Anderson vs. Pacific Bank*, 112 Cal. 598, and *Farley vs. Turner*, 26 Law J. Ch. 710, were all similar. In each case *there was an augmentation of assets*. In the first, “Massey thereupon gave the cashier \$1225 in

bank bills." This money "was put into the drawer with the other money of the bank."

In the *Anderson* case:

"To protect defendant and the sureties it might furnish from liability or loss, plaintiff agreed to deposit with defendant *the sum of \$2,000 in gold coin as a pledge.* Plaintiff *delivered the money* to McDonald, the acting president of the bank."

In the *Farley* case, your Honors, stating the facts (81 Fed. 607), say that Farley *paid in a further sum of 707 pounds.* In all three of these cases there was *an actual deposit of money over the counter of the bank.* All three of the cases have been subjected to criticism on the ground (a) that the relation between the parties was that of debtor and creditor, and (b) that the fund had not been traced. It must be conceded that in each of the three above cases, there was an actual fund created. There was no fund created in the *Sundquist* case.

An excellent review and explanation of these cases is found in *In re Marsh*, 116 Fed. 396.

The remaining case of *People vs. City Bank of Rochester*, 96 N. Y. 32, supports your Honors' ruling. We believe it is the only case that can be cited in support of the case at bar. The New York court later said

in the matter of *Carvin vs. Gleason*, 105 N. Y. 256, at page 263:

"The case of *People vs. City Bank of Rochester* seems to have been misunderstood. The question considered in this case was not raised there. It was not claimed in that case that the proceeds of the checks of Sartwell, Hough & Co., the petitioners, had not gone into the general funds of the bank or that they had not passed in some form to the receiver. The court did not decide that petitioners would have been entitled to a preference in case the proceeds of the check had been used by the bank and were not represented in its assets in the hands of the receiver."

If your Honors will mark the clear distinction between the mere *shifting of credits* from one form to another and the actual augmentation by the *payment of gold coin over the counter* of the bank, we believe that you will deny the preference in this case to *Sundquist*, which ruling will harmonize with the universal holdings of the Federal courts.

Respectfully submitted,

R. P. OLDHAM,

R. C. GOODALE,

Attorneys for Appellant.

This is to certify that I am one of the counsel for the appellant in this case. In my judgment the foregoing petition for rehearing is well founded. It is not interposed for delay.

R. P. Oldham

United States
Circuit Court of Appeals

For the Ninth Circuit.

A. R. TITLOW, as Receiver of the UNITED
STATES NATIONAL BANK OF CEN-
TRALIA, and the UNITED STATES NA-
TIONAL BANK OF CENTRALIA,
Appellants,

VS.

ANNA E. McCORMICK,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the Western District of Washington,
Southern Division.

Filed

OCT 5 - 1916

E. D. Munckton,
Clerk.

No. 2653

United States
Circuit Court of Appeals
For the Ninth Circuit.

A. R. TITLOW, as Receiver of the UNITED
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the District Court of the United States for the Western District of Washington, Southern Division.

IN EQUITY—No. —.

ANNA E. McCORMICK,

Plaintiff,

vs.

A. R. TITLOW, Receiver of the UNITED STATES NATIONAL BANK OF CENTRALIA, and the UNITED STATES NATIONAL BANK OF CENTRLIA,

Defendants.

Praeipice of the Defendants for Record.

To Frank L. Crosby, Clerk of said Court:

Kindly prepare, certify and transmit to the clerk of the Circuit Court of Appeals for the Ninth Circuit at San Francisco, a typewritten transcript of

*Page-number appearing at foot of page of certified Transcript of Record.

the record upon appeal in the above-entitled cause, containing the following portions of the record in the above-entitled cause, to wit: (omitting all captions, endorsements, verifications, etc., excepting file-marks.)

1. Complaint.
2. Amended Answer.
3. Stipulation for Substitution of Parties and Order Allowing same.
4. Decree.
5. Statement of Evidence and Order Approving Same.
6. Petition for Appeal.
7. Assignment of Errors.
8. Order Allowing Appeal.
10. Praecept of Defendants for Record.
11. Certificate of Comptroller of Currency Directing Appeal.
12. Notice of Filing Defendants Proposed Statement of Testimony. [2]

Dated August 23, 1915.

BAUSMAN, OLDHAM & GOODALE,
Attorneys for Defendants.

Copy of the within praecipe received and service acknowledged this 23d day of August, 1915.

HAYDEN, LANGHORNE & METZGER,
Attorneys for Plaintiff.

(Filed Aug. 23, 1915.) [3]

[Title of Court and Cause.]

Bill of Complaint.

To the Honorable, the Judges of the District Court
of the United States for the Western District of
Washington, Sitting in Equity:

Anna E. McCormick, a resident of Tacoma, in the Western District of Washington, Southern Division, brings this her Bill of Complaint against Clinton A. Snowden, as Receiver of The United States National Bank of Centralia, a national banking corporation organized and existing under and by virtue of the laws of the United States relative to national banks, with its principal place of business at Centralia, in the Western District of Washington, Southern Division, and against said The United States National Bank of Centralia, and thereupon your orator complains and alleges:

I.

That at all times hereinafter mentioned The United States National Bank of Centralia was and is a corporation organized and existing under and by virtue of the laws of the United States with its principal place of business at Centralia, Lewis County, Washington; that at all times hereinafter mentioned The United States National Bank of Centralia conducted a general banking business as a national bank at [4] Centralia, until the 21st day of September, 1914, at which time the said bank became insolvent and closed its doors, and thereafter and on or about the 21st day of September, 1914, Francis A. Chapman was appointed by the Comptroller of Currency

as Receiver of said bank and remained such Receiver until the 16th day of November, 1914, at which time the defendant Clinton A. Snowden was appointed by the Comptroller of Currency as Receiver of said bank, and ever since has been and now is the duly appointed, qualified and acting Receiver of said bank, and that at all times since the said bank closed its doors on September 21st, 1914, as hereinbefore alleged the said bank has remained closed, being in an insolvent condition, and the said receivers have been engaged in liquidating or attempting to liquidate the affairs of said banking institution.

II.

That heretofore and on or about the 22d day of August, 1913, the complainant left with the said The United States National Bank of Centralia, certain warrants owned by her issued by School District No. 9 being of Lewis County, Washington, said School District No. 9 being a school district duly organized under the laws of the State of Washington; said warrants so left by complainant for collection being fully described in a receipt issued by The United States National Bank of Centralia under that date, copy of which receipt is attached to this Bill of Complaint marked Exhibit "A."

III.

That thereafter on the 31st day of January, 1914, the said School District No. 9 called certain of the warrants [5] so left with The United States Na-

tional Bank of Centralia for collection, to wit:

No. 3231 for \$.80

No. 3297 “ 500.00

No. 3298 “ 500.00

No. 3299 “ 500.00

for payment and said warrants were presented for payment by The United States National Bank of Centralia to the County Treasurer of Lewis County and paid on the 4th day of February, 1914, the amount being then paid by the County Treasurer of Lewis County to The United States National Bank of Centralia, in redemption of said warrants being the sum of SIXTEEN HUNDRED FIFTY NINE and 54/100 (\$1659.54) DOLLARS; that The United States National Bank of Centralia received the money for said warrants so cashed by it, but failed to pay over said money or any part thereof to this complainant; that of the interest amounting to ONE HUNDRED FIFTY EIGHT and 74/100 (\$158.74) DOLLARS so collected by the said bank from said warrants, The United States Bank of Centralia was entitled to retain the sum of ONE HUNDRED ELEVEN and 18/100 (\$111.18) DOLLARS, being the interest accrued up to August 22d, 1913; the balance of the interest amounting to FORTY SEVEN and 56/100 (\$47.56) DOLLARS was the property of the complainant, so that the amount which the said bank should have paid over to the complainant was the sum of FIFTEEN HUNDRED FORTY EIGHT and 36/100 (\$1548.36) DOLLARS.

IV.

That on or about the 11th day of April, 1914, the

said School District No. 9 called warrants then outstanding and included within the list of warrants left by the complainant with The United States National Bank of Centralia [6] for collection Nos. 3304 to 4029, both inclusive, in the principal sum of THIRTEEN THOUSAND ONE HUNDRED THREE and 14/100 (\$13,103.14) DOLLARS; that on the 14th day of April, 1914, The United States National Bank of Centralia presented said warrants to the County Treasurer of Lewis County for payment, and on that date the same were redeemed and paid by the County Treasurer to The United States National Bank of Centralia by the payment of the sum of FOURTEEN THOUSAND THREE HUNDRED THIRTY-SEVEN and 24/100 (\$14,337.24) DOLLARS, which sum of money was paid over by the County Treasurer to The United States National Bank of Centralia on said date; that of said money so paid over the sum of \$1,229.22 was interest, of which interest The United States National Bank of Centralia was entitled to retain interest on said warrants which accrued down to the 22d day of August, to wit, the sum of \$635.09, and the balance of the interest so collected belonged to and was the property of this complainant; that no part of said money so collected by The United States National Bank of Centralia was ever paid by said bank unto said complainant.

V.

That your orator is informed that The United States National Bank of Centralia, instead of keeping said money so collected separate and apart from

the moneys of The United States National Bank of Centralia, and instead of paying said moneys over to the complainant, mingled said moneys with the funds of The United States National Bank of Centralia; that at all times subsequent to the collection of said warrants paid February 4, 1914, down to the appointment of a Receiver for The United States National Bank of Centralia, the said bank had on hand moneys more than equal to the amount of money [7] so collected and belonging to the complainant, as your orator is informed and believes, and at all times since the 14th day of April, 1914, The United States National Bank of Centralia had on hand moneys more than equal to the moneys then paid The United States National Bank of Centralia in redemption of said warrants by the County Treasurer of Lewis County in addition to the moneys paid The United States National Bank of Centralia on February 4, 1914, as hereinbefore alleged; that when the said bank closed in September, 1914, and when the Receiver was appointed by the Comptroller of Currency on the 21st day of September, 1914, there was cash on hand amounting to about \$29,000.00, and complainant alleges on information and belief that not less than \$29,000.00 in money was kept on hand by the said bank at all times subsequent to the collection of said warrants so paid on the 4th day of February, 1914, and came into the hands of the receiver appointed as before alleged, and ever since remained and now is on hand.

VI.

That your orator having employed The United

States National Bank of Centralia as its agent for the collection of said warrants fully relied upon said bank to make said collection, and, therefore, your orator took no further steps to ascertain when the warrants might be called or paid and did not know that the warrants had been called or paid until the said bank ceased to do business in September, 1914.

VII.

That the defendant has refused to turn over said money or any part thereof unto complainant, though proper demand has been made therefor. [8]

VIII.

That among the warrants so turned over by the complainant to The United States National Bank for collection were the following school warrants issued by said School District No. 9 of Lewis County:

No. 4118	for \$	3.00
No. 4121	“	5.60
No. 4124	“	150.00
No. 4130	“	27.50
No. 4139	“	7.45
No. 4140	“	6.35
No. 4143	“	13.40

That said warrants were by The United States National Bank negotiated, sold or pledged to some person, corporation or firm unknown to your orator, and a sum received by the bank therefor at least equal to the face value thereof, to wit, the sum of \$213.30; that the time when said warrants were so pledged or negotiated by the bank is not known to your orator; that such sum of money, at least equal to the face value of said warrants, was as your orator

is informed and believes, mingled with the other moneys in the hands of the bank and from said time down to the appointment of a Receiver for said bank the said bank had on hands, as your orator alleges on information and belief, moneys more than equal to the amount of moneys so received from the said warrants in addition to moneys more than equal to the amounts so paid to said bank in redemption of the warrants cashed as hereinbefore alleged.

IX.

That complainant has no plain, adequate and complete remedy at law.

X.

That the amount of this controversy exceeds \$3,000.00 exclusive of interest and costs. [9]

WHEREFORE, and forasmuch as your orator is remediless in the premises according to the strict rules of common law and can have relief only in a court of equity where matters of this kind are properly cognizable and your orator prays equitable relief as follows:

1st. That the defendant Clinton A. Snowden as Receiver of The United States National Bank of Centralia and the defendant The United States National Bank of Centralia may be required to make answer unto all and singular the matters hereinbefore stated and charged as fully and particularly as if they were herein expressly and particularly interrogated concerning the same, but not under oath, answer under oath being hereby waived.

2d. That the Court may decree that the defendant Clinton A. Snowden as Receiver of The United

States National Bank of Centralia holds in trust for the complainant the sum of FIFTEEN THOUSAND TWO HUNDRED FORTY-FIVE and 63/100 (\$15,245.63) DOLLARS, and that said trust is not destroyed or impaired by the fact (if it is a fact) that the moneys so collected as herein alleged may have been intermingled with other funds of The United States National Bank and that the rights of the complainant in and to said funds are paramount and superior to the rights and claims of any other person whomsoever.

3d. That the defendant may be required to pay over to the complainant the said trust moneys.

4th. That pending this suit a writ of injunction may issue out of and under the seal of this Honorable Court directing, enjoining and restraining the defendant [10] Clinton A. Snowden as Receiver from paying out the moneys so held in trust for this complainant or any of it, or any moneys except moneys in excess of the amount of this claim; or from transmitting to the Comptroller of the Currency any moneys he may have, or may collect, except moneys in excess of the amount of complainant's claim.

5th. That the complainant may have such other and further relief as the Court may deem equitable.

May it please your Honors to grant unto your orator not only a writ of injunction conformable to the prayer hereof, but also a writ of subpoena directed to the said defendant Clinton A. Snowden, as such Receiver, and said The United States National Bank of Centralia, commanding them at a certain

time and under a certain penalty to be therein specified, to be and appear before this Honorable Court then and there to answer the premises and to abide by the order and decree of the Court herein and that they may appear herein according to law.

ANNA E. McCORMICK,
By M. A. LANGHORNE,
F. D. METZGER,
E. M. HAYDEN,
Her Solicitors.

United States of America,
District of Washington,—ss.

Anna E. McCormick, being first duly sworn, says that she is the complainant in this suit; that she has read the foregoing bill of complaint, knows the contents thereof; that the allegations therein contained are true to her knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters she is informed and believes the same to be true.

[Seal] ANNA E. McCORMICK.

SUBSCRIBED and sworn to before me this 22 day of December, 1914.

E. M. HAYDEN,
Notary Public in and for the State of Washington.
[11]

Exhibit "A" (to Complaint).

Tacoma, Wash., Aug. 22, 1913.

RECEIVED from Mrs. Anna E. McCormick for collection, the following warrants issued by School District No. 9, Lewis County, Washington.

Number.	Amount.	Number.	Amount.
3297	\$500.00	3477	\$ 85.00
3231	.80	3479	85.00
3298	500.00	3480	80.00
3299	500.00	3481	80.00
3304	500.00	3482	75.00
3305	236.33	3484	166.67
3306	166.67	3489	56.70
3314	4.30	3500	49.10
3317	194.01	3501	63.00
3322	166.67	3506	20.00
3326	3.00	3508	229.62
3327	12.50	3511	16.60
3329	10.00	3512	4.88
3332	4.50	3516	6.60
3333	80.00	3517	1.40
3345	6.80	3518	4.65
3350	40.00	3520	361.04
3351	31.02	3521	5.00
3353	40.00	3522	10.05
3355	90.00	3524	42.61
3356	100.00	3525	40.00
3357	80.00	3528	13.72
3359	85.00	3532	100.00
3360	85.00	3534	70.00
3361	80.00	3538	70.00
3363	80.00	3539	75.00
3364	80.00	3540	48.75
3368	75.00	3543	60.00
3369	70.00	3544	60.00
3377	100.00	3548	75.00
3388	60.00	3549	70.00

Number.	Amount.	Number.	Amount.
3392	65.00	3552	70.00
3393	75.00	3559	65.00
3404	50.00	3560	75.00
3413	34.70	3572	80.00
3415	1.80	3573	85.00
3416	5.00	3575	80.00
3421	11.70	3576	75.00
3422	10.50	3578	166.67
3427	12.00	3583	70.00
3437	12.65	3584	55.00
3444	60.00	3591	3.75
3447	100.00	3597	6.27
3449	70.00	3599	15.90
3452	70.00	3601	1.00
3456	75.00	3603	20.00
3457	70.00	3604	134.45
3460	70.00	3606	11.75
3465	65.00	3607	5.15
3466	75.00	3609	3.17
3470	90.00	3617	75.00
[12]			
3472	\$ 90.00	3618	\$ 70.00
3473	100.00	3624	75.00
3474	80.00	3628	70.00
3476	85.00	3633	75.00
3634	65.00	3833	6.11
3636	75.00	3834	16.79
3638	60.00	3839	131.30
3643	75.00	3842	75.00
3648	90.00	3843	60.00
3650	90.00	3845	63.75

Number.	Amount.	Number.	Amount.
3651	60.00	3846	63.75
3652	80.00	3847	60.00
3654	85.00	3844	63.75
3655	85.00	3849	60.00
3656	80.00	3850	60.00
3658	80.00	3853	75.00
3659	80.00	3854	56.25
3662	166.67	3855	52.50
3667	70.00	3860	56.25
3668	55.00	3861	45.00
3673	12.24	3862	75.00
3676	20.15	3869	56.25
3677	8.40	3874	45.00
3678	5.28	3878	48.75
3679	17.80	3880	56.25
3680	120.50	3884	67.50
3681	12.05	3885	52.50
3684	4.00	3944	65.00
3686	3.10	3951	13.15
3699	90.00	3980	101.14
3700	100.00	3986	40.00
3701	80.00	4029	80.00
3704	85.00	4048	10.00
3705	80.00	4051	12.05
3707	80.00	4053	7.92
3708	80.00	4056	6.63
3709	75.00	4058	14.55
3713	70.00	4059	6.44
3720	60.00	4060	2.80
3733	60.00	4061	7.15
3738	65.00	4067	2.88

Number.	Amount.	Number.	Amount.
3745	11.65	4068	1.05
3746	3.96	4069	48.64
3748	4.75	4071	5.20
3755	104.50	4074	75.00
3758	9.46	4078	63.75
3759	18.25	4079	60.00
3762	1.90	4086	56.25
3763	17.15	4091	48.75
3767	166.67	4093	56.25
3773	55.00	4097	45.00
3778	90.00	4098	45.00
3779	100.00	4103	52.50
3780	80.00	4108	56.25
3782	85.00	4118	3.00
3783	85.00	4121	5.60
3784	80.00	4124	150.00
3786	80.00	4130	27.50
3787	80.00	4139	7.45
3792	70.00	4140	6.35
3797	70.00	4143	13.40

[13]

3799	\$ 60.00
3802	70.00
3806	70.00
3807	75.00
3813	60.00
3821	75.00

Number.	Amount.	Number.	Amount.
3826	23.65		
3828	11.25		
3831	6.00		

THE UNITED STATES NATIONAL BANK,
CENTRALIA, WASH.

C. S. GILCHRIST,
Vice-president.

(Filed Dec.22,1914.) [14]

Amended Answer to Bill of Complaint.

Come now the above-entitled defendants A. R. Titlow, as Receiver of the United States National Bank of Centralia, Lewis County, Washington, and the United States National Bank of Centralia, Washington, and for answer to the bill of complaint herein allege and say as follows, to wit:

I.

That they admit the allegations, statements and averments found and made in paragraph I and II of complainant's bill of complaint.

II.

As to paragraph III thereof defendants admit that on or about the 4th day of February, 1914, it received a check upon a certain bank drawn by the Country Treasurer of Lewis County, Washington, for a sum covering the amount therein mentioned, which included payment of the warrants therein mentioned, together with other warrants, said check being for more than the sum mentioned in said paragraph, but it received no money on account of said check, but whether said warrants belonged to said plaintiff these defendants have no knowledge

and not sufficient information to form a belief as to the same. Defendants admit that of such warrants defendant United States National Bank was entitled to all interest upon said warrants up to and including the 22d day of August, 1913. That said check drawn by the County Treasurer of Lewis County, Washington, was drawn against Coffman, Dobson & Company, bankers of Chehalis, Lewis County, Washington. If it is true, as in said bill of complaint alleged, that \$158.74 was interest, that said United States National Bank would be entitled and was entitled at said time to the credit of \$111.18 of said amount of [15] interest as its credit. Defendants deny each and every other allegation in said paragraph contained.

III.

As to paragraph IV, these defendants deny that the sum of \$14,337.24 or any part thereof was paid to the United States National Bank on April 14, 1914, or at any other time, and allege the fact to be that said sum, or any part thereof, never in fact came into the said United States National Bank of Centralia, but that it received only a credit in other banking institutions in the State of Washington as a result of the transaction mentioned in paragraph IV. And further *answer* said paragraph of the complaint these defendants demand the strictest proof of the allegations, statements and averments in said paragraph contained.

IV.

For answer to paragraph V thereof these defendants allege that they have no knowledge and not suffi-

cient information to form a belief as to the allegations therein contained, therefore they deny each and every allegation therein contained. And further answering said paragraph of the complaint these defendants allege on information and belief that at no time, either at the time of the alleged receiving of checks from the Treasurer of Lewis County, Washington, or at any other time thereafter, was there ever any moneys come into the said United States National Bank derived from the warrants alleged to be the warrants of said complainant herein, but the only thing that said United States Bank received, if it received anything at all from said alleged source, was credit in various banking institutions throughout the State of Washington, and that said credits and each of them in said other banking institutions were greater in [16] each instance than the amount mentioned and set forth in said complainant's bill of complaint, and that thereafter the said credits so given to said United States National Bank in other banking institutions of the State of Washington and before the insolvency of said United States National Bank on the 21st day of September, 1914, were entirely exhausted and wiped out. And further answering said paragraph of the complaint these defendants allege, upon information and belief, that not only was there absence of money coming from the source mentioned in said complaint into said United States National Bank, but all the moneys in said bank at said time were moneys come from other sources, and all moneys that have been in said bank at all times since the dates therein men-

tioned and alleged said bank receiving from said County Treasurer, has been moneys deposited by other persons, individuals and corporations in said bank and collected from other sources entirely than from the sources in said complaint mentioned.

V.

As to paragraph VI thereof these defendants say that they are without knowledge as to any of the allegations, averments and statements therein made. And further answering said paragraph of said complaint these defendants allege that if there was such employment as therein alleged that said contract must have been a contract without consideration moving to said United States National Bank, and it was the duty of the said complainant to look after in a reasonably careful and diligent manner such property as alleged was entrusted to said bank or any one of its officers, and that the complainant has been guilty of such laches in respect to the ascertainment and prosecution of her alleged claim as to disentitle her to relief in this court. [17]

VI.

As to paragraph VII thereof these defendants admit that a demand has been made upon defendants herein and that said defendants have not paid over to said complainant any such moneys as therein alleged or any other money on account of the allegations and demands made in said complaint. And further answering said paragraph these defendants allege that defendants do not now have and never have had at any time any moneys belonging to the said complainant.

VII.

As to paragraph VIII thereof these defendants say that they are without knowledge as to any of the allegations, statements and averments therein made. And further answering said paragraph these defendants allege that if said warrants belonged to said complainant as therein mentioned, and if they were left with the United States National Bank, and were sold or pledged by it, no moneys arising from such transfer, if any, came into the said United States National Bank at the time in said paragraph stated, or any other time so far as these defendants know, and that all of the moneys that have been in said bank at and since said time has been money that came into said bank from other sources and particularly from depositors at and after said time therein mentioned.

IX.

As to paragraph IX of said complaint, these defendants deny each and every allegation therein contained.

X.

Further answering the bill of complaint defendants allege that the following suits have been filed in this court against these defendants: [18]

1. A suit entitled *The City of Centralia, a municipal corporation, complainant, vs. The United States National Bank, et al., Defendants in Equity*,—No. 25-E, in which the complainant seeks to establish a preferred claim against the assets in the hands of the defendant receiver in the sum of \$44,553.09, on the ground that said sum is a trust fund

in the hands of the defendants in favor of the complainant.

2. A suit entitled Continental & Commercial National Bank of Chicago, a corporation, complainant, vs. A. R. Titlow, as Receiver of the United States National Bank, et al., Defendants; in Equity—No. 38-E, in which the complainant seeks to establish a preferred claim against the assets of the United States National Bank in the hands of the defendants in the sum of \$5,166.67, on the ground that this sum is held by the defendants for the complainant as a trust fund.

3. A suit entitled G. C. Frisbie, Plaintiff, vs. The United States National Bank of Centralia, Washington, and A. R. Titlow, Receiver, in Equity—No. 35-E, in which the plaintiff seeks to establish a preferred claim against the assets of the United States National Bank in the hands of the defendants herein in the principal sum of \$5,000, on the ground that this sum constitutes a trust fund in the hands of the United States National Bank and its Receiver in favor of plaintiff.

4. A suit entitled Frank P. McKinney as Receiver of Olympia Bank & Trust Company, Complainant, vs. A. R. Titlow, as Receiver of the United States National Bank of Centralia; in Equity—No. 32, in which the complainant therein seeks to establish a preferred claim in the sum of \$36,500, on the ground that said sum is held by the United States National Bank and its receiver as a trust fund for the benefit of the complainant therein. [19]

5. A suit entitled Nicholas V. Petrinovich, Plain-

tiff, vs. A. R. Titlow, Receiver of the United States National Bank of Centralia, Washington, Defendant; in Equity—No. 37-E, in which the plaintiff seeks to establish a preferred claim against the assets of the United States National Bank in the hands of its receiver in the sum of \$150.00, on the ground that said sum is held by the United States National Bank and its receiver as a trust fund for the benefit of the complainant therein.

The five cases hereinbefore mentioned in this paragraph are all pending and at issue in this court.

6. A suit entitled John E. Sundquist, Plaintiff, vs. Clinton A. Snowden, Receiver of the United States National Bank, et al, Defendants, No. 1693, seeks to establish a preferred claim against the assets of the United States of the United States National Bank in the hands of its receiver in the sum of \$1296.00, on the ground that this sum was held by the United States National Bank and its receiver as a trust fund for the benefit of the plaintiff therein; that a decree was entered therein in favor of the plaintiff for that amount on the 15th day of February, 1915, from which decree an appeal will be duly taken by the defendant receiver.

7. A suit entitled George R. Wilson and wife vs. Clinton A. Snowden, as receiver of the United States National Bank; in Equity—No. 21-E, in which the plaintiffs seek to establish a preferred claim against the assets of the United States National Bank in the hands of its receiver in the sum of \$1500, on the ground that this sum is held by the defendant bank and its receiver as a trust fund for the benefit of the

plaintiffs therein. A decision has been filed by this Court denying the plaintiff's right to relief in that case, but no formal judgment has been entered and the defendants herein are without knowledge as to whether an appeal will be taken. [20]

8. The defendants are informed and believe that other suits for the purpose of establishing the right to preferred claims against the assets of the United States National Bank are now contemplated by other persons, and that such suits will be brought; but as to the amount of such claims the defendants are without knowledge.

Further answering the defendants say that on September 21, 1914, when the United States National Bank was closed and a Receiver appointed therefor, there was in cash on hand in its vaults the sum of approximately \$27,000 and no more. That at a certain time prior thereto and subsequent to the transactions mentioned in the complaint herein, the cash on hand did not exceed the sum of about \$22,000.

WHEREFORE, these defendants having fully answered herein to the best of their knowledge, information and belief, and the premises being fully considered, they pray this Honorable Court as follows:

1. That the said complainant, Anna E. McCormick, take nothing against these defendants or either of them, and that her bill of complaint herein be dismissed.

2. That the said A. R. Titlow, as Receiver of the United States National Bank of Centralia, Lewis County, Washington, be not declared and held to

hold in trust for complainant any sum of money whatsoever, and that defendants be not required to pay to said complainant any moneys whatsoever under her said claim herein.

3. That if, upon strict proof before this Honorable Court, it is found that said complainant is entitled to any relief against these respondents, or either of them, that she be required, under the rules and practice of this Court and of the [21] Treasury Department of the United States, to file her claim with said A. R. Titlow, Receiver of said United States National Bank of Centralia, and have the same allowed or disallowed according to said rules and practice, but not as a preferred claim or a trust of any kind or nature whatever.

4. That there be no injunction issued against these defendants, or either of them, from interfering or attempting to interfere with the termination of said trust, and particularly that no such restraining order or injunction be issued against your defendant, A. R. Titlow, Receiver of said United States National Bank of Centralia, in paying or attempting to pay any dividends to creditors and distribution under a dividend declared by the Comptroller of the Currency of the United States under such Treasury Department.

5. That if the Court shall find that the defendants, by reason of the transactions set forth in the complaint, hold the sum demanded in the complaint, or any part thereof, in trust for complainant, the Court shall not enter as against the defendants a decree in favor of complainant for the full amount of

such trust fund, but only for such proportion thereof as complainant may be entitled to out of the sum of \$22,000.00 mentioned in paragraph X hereof, ratably with all other claims which may be established as preferred claims against the assets of The United States National Bank in the hands of its Receiver.

6. That these defendants and each of them have judgment for their costs and disbursements in this action and such other and further relief as to the Court may seem meet and equitable upon the facts of this case.

BAUSMAN, OLDHAM & GOODALE,
Solicitors for Defendants.

(Verified.)

(Filed June 22, 1915.) [22]

Stipulation for Substitution of Parties Defendant and Solicitors for Defendant.

It appearing that Clinton A. Snowden resigned from the receivership of the United States National Bank of Centralia on or about March 1, 1915, and that A. R. Titlow formerly solicitor for the Receiver, was on March 1, 1915, duly appointed by the Comptroller of the Currency, Receiver of the United States National Bank of Centralia, it is stipulated between the parties hereto that A. R. Titlow be and he is hereby substituted as a party defendant in this cause in the place and stead of Clinton A. Snowden, and that Bausman, Oldham & Goodale are substituted for A. R. Titlow as the solicitors for the Receiver and for the bank and that an order making

such substitution as of the date of March 1, 1915, may be entered.

Dated this 5 day of August, 1915.

HAYDEN, LANGHORNE & METZGER,

Solicitors for Complainant.

BAUSMAN, OLDHAM & GOODALE,

Solicitors for the Receiver and for the United States
National Bank.

It is so ordered.

Done in open court this 23d day of August, 1915.

EDWARD E. CUSHMAN,

Judge.

(Filed Aug. 23, 1915.) [23]

[Title of Court and Cause.]

Decree.

This cause came on to be finally heard on the 22d day of June, 1915, Hayden, Langhorne & Metzger appearing as solicitors for the complainant and Bausman, Oldham & Goodale appearing as solicitors for the defendant.

After introduction of the testimony, both oral and documentary, and after argument of counsel, the Court took said cause under consideration until July 15th, 1915, at which time it filed a written opinion granting to complainant a portion of the relief asked for in the complaint, all of which more fully appears by a reference to the opinion on file herein; and it appearing from the proofs in said case that there came into the hands of the United States National Bank of Centralia of the moneys of the complainant

the sum of \$15,249.55, of which amount the complainant was entitled to a preference in the sum of \$10,054.69.

WHEREFORE, on motion of counsel for complainant, IT IS NOW ORDERED, ADJUDGED AND DECREED, and this does [24] ORDER, ADJUDGE AND DECREE that the complainant do have and recover judgment against A. R. Titlow, as receiver of the United States National Bank of Centralia, Washington, in the sum of \$15,249.55, and that out of that amount the said complainant is entitled to preference to be paid in full in the sum of \$10,054.69, and for allowance of the balance, viz., \$5,195.55 as a common creditor of the United States National Bank of Centralia.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant A. R. Titlow, as Receiver of the United States National Bank of Centralia, pay to the said complainant the said sum of \$10,054.69 allowed as a preference out of any moneys he may now have on hand that came into his possession at the time of the closing of the doors of the United States National Bank of Centralia; or in the event that all of the moneys that were then on hand have been disbursed, that he pay to complainant said amount of any other moneys that he may now have on hand or that may hereafter come into his hands as receiver of the said United States National Bank of Centralia.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said receiver pay to complainant the amount of whatever dividend may be

due her on the said sum of \$5,195.55 as a common claim against the said United States National Bank of Centralia.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, and this does order, adjudge and decree that the said defendant A. R. Titlow, as Receiver of the United States National Bank of Centralia, reserve out of any moneys that may now be in his hands or that may hereafter come into his hands a sum sufficient to pay said complainant said sum of \$10,054.69 in full of complainant's said claim before declaring any dividends and making payment to [25] the common creditors of The United States National Bank of Centralia.

To all of which counsel for defendant excepted.

Done in open court this 2d day of August, 1915.

EDWARD E. CUSHMAN,

District Judge.

(Filed Aug. 2, 1915.) [26]

Statement of Testimony.

[Testimony of George Dysart, for Plaintiff.]

GEORGE DYSART was called as a witness on behalf of the plaintiff and testified as follows:

That he was an attorney at law, lived at Centralia, Washington, was a director and second vice-president of the United States National Bank of Centralia prior to its failure on September 21, 1915. The other officers of that bank were Charles Gilchrist, President; C. S. Gilchrist, First Vice-president and Manager; J. W. Daubney, Cashier; Ross

(Testimony of George Dysart.)

W. Daubney, Assistant Cashier; that C. S. Gilchrist, the Vice-president and Manager, had active charge of the affairs of the bank ever since its organization in May, 1907. The directors of the bank were J. W. Vaness, Charles Gilchrist, C. S. Gilchrist, J. W. Daubney, and the witness; that these directors knew from time to time that Mr. Gilchrist was taking various securities for collection.

Plaintiff then introduced in evidence a receipt of the United States National Bank under date of August 22, 1913, for collection, of certain warrants issued by School District No. 9, Lewis County, Washington, which receipt is signed by the United States National Bank of Centralia, Washington, by C. S. Gilchrist, its vice-president, the warrants enumerated in this receipt being identical with the exhibit "A" attached to the bill of complaint (Plaintiff's Exhibit No. 1.) [27]

[Testimony of Elmer M. Hayden, for Plaintiff.]

ELMER M. HAYDEN was then called as a witness on behalf of plaintiff and testified as follows:

That he was a lawyer, lived in Tacoma, was acquainted with Mrs. McCormick, and was her attorney on August 16, 1913. That Mr. Daubney called his attention to the fact that the bank had some warrants of School District No. 9, Lewis County, and Hayden suggested that if Daubney would write him concerning these warrants, that he would find out what he could buy them at; that Mrs. McCormick had funds and if they turned out to be a good investment, she might buy them. The outcome of these ne-

(Testimony of Elmer M. Hayden.)

gotiations was that Mrs. McCormick bought the warrants.

Plaintiff then introduced in evidence a letter from J. W. Daubney relative to the sale of the warrants to Mrs. McCormick. On cross-examination the witness testified that the result of the transactions between the bank and Mrs. McCormick was that she purchased the warrants from the bank and that she then returned them to the bank for collection. It was admitted that a check of the Treasurer of Lewis County, Washington, for \$1747.04, drawn to the order of the United States National Bank of Centralia, dated February 4, 1914, was in payment of the warrants set forth in the third paragraph of the plaintiff's bill of complaint, together with a warrant of \$87.50, which was the property of the bank. It was further admitted that other four checks of similar character for \$1,765.06, \$3,598.00, \$4,061.77, and \$4,912.41, aggregating \$14,337.24, all drawn by the Treasurer of Lewis County, to the Order of the United States National Bank, were given in payment of warrants Nos. 3304 to 4029, both inclusive, as set forth in the fourth paragraph of the complaint, these checks representing the face of the various warrants and interest to the date of call. These five checks, as herein enumerated, were thereupon introduced in evidence by the plaintiff as exhibits 3, 4, 5, 6 and 7.

Exhibit No. 3—Check.

No. 1083.

Office of County Treasurer.

LEWIS COUNTY,

State of Washington.

Chehalis, Wash.

4/14, 1914.

Pay to the order of UNITED STATES NATIONAL BANK OF CENTRALIA \$4061.77, Four Thousand Sixty One Dollars Seventy Seven Cents.

B. F. ARNOLD,

Treasurer.

To the CHEHALIS NATIONAL BANK,

Chehalis, Wash.

98-61

Endorsed as follows:

Pay to the order of any Bank, Banker or Trust Co.,

Apr. 16, 1914.

THE BANK OF CALIFORNIA.

34-8 National Association. 34-3

Tacoma, Wash.

S. M. JACKSON, Manager.

Pay to the order of BANK OF CALIFORNIA,
N. A.

All prior endorsements guaranteed.

UNITED STATES NATIONAL BANK.

98-43 Centralia, Wash. 98-43

J. W. DAUBNEY, Cashier.

Pay Yourselfs.

COFFMAN, DOBSON & CO., Bankers.

98-59 Chehalis, Wash. 98-59

Exhibit No. 4—Check.

No. 1082.

Office of County Treasurer.

LEWIS COUNTY,

State of Washington.

Chehalis, Wash.

4/14, 1914.

Pay to the order of UNITED STATES NATIONAL BANK OF CENTRALIA, \$4,912.41,
 Forty Nine Hundred *Dollars Forty* One Cents.

B. F. ARNOLD,

Treasurer.

To the CHEHALIS NATIONAL BANK,

Chehalis, Wash.

98-61

Endorsed as follows:

Pay to the order of any Bank, Banker or Trust Co.,
 Apr. 16, 1914.

THE BANK OF CALIFORNIA.

34-3 National Association. 34-3

Tacoma, Wash.

S. M. JACKSON, Manager.

Pay to the order of BANK OF CALIFORNIA,
 N. A.

All prior endorsements guaranteed.

UNITED STATES NATIONAL BANK.

98-43 Centralia, Wash. 98-43.

J. W. DAUBNEY, Cashier.

Pay Yourselfs.

COFFMAN, DOBSON & CO., Bankers.

98-59 Chehalis, Wash. 98-59 [29]

Anna E. McCormick.

33

Exhibit No. 5—Check.

No. 2473.

TREASURER'S OFFICE,

Lewis County.

Chehalis, Wash., 2/4, 1914.

Pay to the order of UNITED STATES NATIONAL BANK OF CENTRALIA \$1747.04, Seventeen Hundred Forty Seven Dollars Four Cents.

To COFFMAN, DOBSON & CO., Bankers, 98-59.

Chehalis, Wash.

B. F. ARNOLD,

County Treasurer.

Endorsed as follows:

Pay to the Order of COFFMAN, DOBSON & CO.,
Chehalis, Wash.

All prior endorsements guaranteed.

UNITED STATES NATIONAL BANK,

98-43 Centralia, Wash. 98-43

J. W. DAUGNEY, Cashier.

Exhibit No. 6—Check.

No. 428.

TREASURER'S OFFICE,

Lewis County.

Chehalis, Wash., Apr. 14, 1914.

Pay to the order of UNITED STATES NAT'L BANK, \$3,598.00, Thirty Five Hundred Ninety Eight Dollars.

To SECURITY STATE BANK,

Chehalis, Wash.

B. F. ARNOLD,

County Treasurer.

By Val. Myer,

Dep.

Endorsed as follows:

Pay to the order of any bank or banker.

Previous Endorsements Guaranteed.

UNITED STATES NATIONAL BANK

98-43 Centralia, Wash. 98-43

J. W. DAUBNEY, Cashier.

Exhibit No. 7—Check.

No. 429.

TREASURER'S OFFICE,

Lewis County,

Chehalis, Wash., Apr. 14, 1914.

Pay to the order of UNITED STATES NATIONAL BANK \$1,765.06, Seventeen Hundred Sixty Five Dollars and Six Cents.

B. F. ARNOLD,

County Treasurer.

By Val. Myer,

Dep.

To SECURITY STATE BANK,

Chehalis, Wash.

Endorsed as follows:

Pay to the order of any bank or banker.

Previous Endorsements Guaranteed.

UNITED STATES NATIONAL BANK.

98-43 Centralia, Wash. 98-43

J. W. DAUBNEY, Cashier. [30]

[Testimony of Samuel M. Jackson, for Plaintiff.]

Samuel M. Jackson was then produced as a witness for the plaintiff, and testified that he had lived in Tacoma for twenty-five years; that his business was banking, the Bank of California, which is in-

(Testimony of Samuel M. Jackson.)

incorporated under the laws of the United States; that he was acquainted with Mr. Gilchrist, formerly vice-president and general manager of the United States National; that the United States National had kept an account with the Bank of California for some five or six years prior to its suspension; that the Bank of California was a correspondent and reserve agent of the United States National. That Plaintiff's Exhibits 3 and 4, being checks in payment of the warrants for \$4,061.67 and \$4,912.41, were deposited by the Centralia Bank with the California Bank on April 16, 1914, and that after these two items were deposited there was to the credit of the United States National Bank with the California Bank on April 16, 1914, \$3,642.20; that these two checks were a part of the deposit of \$19,198.02 made by the Centralia Bank with the Tacoma Bank on the 16th. At the time that the Centralia bank failed on September 19, 1914, it had a credit balance with the Bank of California of \$1,585.36. The account of the Centralia Bank with the Bank of California was reduced by the Centralia drawings and by the California Bank's remittances to them.

On cross-examination the witness testified that the credit balance of the Centralia bank with the Tacoma bank was withdrawn in the ordinary course of business. On April 17, 1915, the credit balance of the United States National with the Bank of California was \$8,444.08; on the 18th, \$6,715.57; on the 20th, \$5,525.19; on the 21st, \$4,882.38; on the 22d, \$2,569.75; on the 23d, \$7,508.24; on the 24th, \$4,804.02;

(Testimony of Samuel M. Jackson.)

on the 25th, \$5,582.97; and on the 27th of April, 1915, the account of the United States National Bank with the Bank of California was overdrawn \$696.15.

Witness said he could not tell what became of the fund without an examination of the records of the bank, except that it went out in the ordinary course of business, that he meant by "ordinary [31] course of business" checking business, the deposit of money, the general or regular business of a bank keeping an account with the California bank.

On recross-examination the witness testified that on April 15, 1914, the United States National Bank's account with the California Bank was overdrawn \$1,953.78.

Witness was handed remittance sheets which were marked for identification, Defendant's Exhibit "B," which remittance sheets showed the charges and withdrawals that were made against the account that the United States National Bank of Centralia had with the Bank of California. Thereupon said remittance sheets were introduced in evidence as Defendant's Exhibit "B."

Defendant's Exhibit "B" (Remittance Sheets of The Bank of California to The United States National Bank of Centralia, from April 14, 1914, to April 28, 1914, both inclusive):

[Defendant's Exhibit "B"—Remittance Sheets of the Bank of California to the United States National Bank of Centralia, from April 14, 1914, to April 28, 1914, both Inclusive.]

THE BANK OF CALIFORNIA.

National Association,

Tacoma, Wash., 4 14 14.

U. S. NATL. BANK,

CENTRALIA, WASH.

Dear Sirs:

We enclose herewith for credit items listed below.

Yours very truly,

S. M. JACKSON,

Manager.

Protest items if marked X.

Wire non-payment of items \$100 or over.

Drawee	X	Amount
98 46		706.10
U		4.65
U		12.35
U		6.81
98 44	X	22.80
98 46		1.08
U		5
U	X	158
U		33
U		24 70
U		38 95
U		43 70
98 44		2
U		13
U		1

98 46	10
U	34 55
U	25 40

 1143 09

(U. S. National Bank,
Apr. 15, 1914,
Centralia, Wash.)

[32]

(Same heading. Dated 4 15 14.)

Drawee	X	Amount
U	X	75 00
98 44		10 68
U		7 44
98 312		7 43
Do.		34 79
C S Gilchrist Tr		44 28

 179 62

U. S. National Bank,
Apr. 16, 1914,
Centralia, Wash.

(Same heading. Dated 4 16 14.)

Drawee	X	Amount
U		699 77
U		60
U		95 64
U		23 45
98 44		15 60
98 46	X	200
U		8 11
U		207 26
U		75

(Testimony of Samuel M. Jackson.)

98 312	2 20
Do.	30 96
Do.	10
Do.	25 95
U	3 75
U	5 40
U	25
U	17 45
C S Gilchrist Tr	15 85

1387 74

U. S. National Bank,

Apr. 17, 1914.

Centralia, Wash.

(Same heading. Dated 4 17 14.)

Drawee	X	Amount
U		5
C S Gilchrist Tr	X	208 85
U		60
U		6 40
98 44	X	76 33
Do.		9
U		6 75
U		4 15
U		4 12
U		10
U		25
98 312		25

381 20

U. S. National Bank,

Apr. 18, 1914,

Centralia, Wash.

(Same Heading. Dated 4 18 14)

Drawee	X	Amount
98 46		131 22
98 44		11 50
C S Gilchrist Tr		29 00
U		40 00
98 44		12 50
98 312		5 00
U		4 00
U		49 50
		<hr/>
		282 72

U. S. NATIONAL BANK

Apr. 20 1914

Centralia, Wash.

(Same Heading. Dated 4 24 14)

Drawee	X	Amount
U	X	53 64
98 46	X	192 26
U		35 75
U		38 25
98 44		16 55
U		92 50
98 46		75
U		12 50
98 46		44 60
98 44		25 00
98 312		10 00
Do.		6 00
Do		4 46

U	44 00
U	18 85
98 46	143 34
U	250 00
	<hr/>
	988 45

U. S. NATIONAL BANK

Apr. 21 1914

Centralia, Wash. [34]

(Same Heading. Dated 4 21 14)

Drawee	X	Amount
98 46		5 00
Do.		149 95
U		3 82
U		28 60
98 46		10 51
Do.		9 52
98 312		6
U		521 33
98 46	X	47 08
98x44		5
U		12 03
.. U	X	48 71
U	X	60
U	X	500
U		9 67
U		6 39
U		287 63
U		17 24
U		103 96
98 312		10 62
Do.		9 33

98 46	32 08
98 312	6 15
U	53 75
U	10
U	5
U	50
U	12 65
U	54 25
	<hr/>
	2 676 27

U. S. NATIONAL BANK

Apr. 22 1914

Centralia, Wash.

(Same Heading. Dated 4 22 14)

Drawee	X	Amount
U		1 75
U		5 25
98 46	X	100
98 312		200
U		50 80
98 312		52 20
U		2
U		14 88
		<hr/>
		426 88

U. S. NATIONAL BANK

Apr. 22 1914

Centralia, Wash. [35]

(Same Heading. Dated 4 23 14)

Drawee	X	Amount
U		4 66
U		5 00

U		13 15
98 312		9 04
98 44	X	76 86
98 46		50 53
U	X	97 61
U	X	136 52
98 46	X	20 18
U		221 25
98 312		50 00
		<hr/>
		684 80

U. S. NATIONAL BANK

Apr. 24 1914

Centralia, Wash.

(Same Heading. Dated 4 24 14)

Drawee	X	Amount
U	X	50 00
98 312		10 75
U		31 30
98 46		140 41
		<hr/>
		232 46

U. S. NATIONAL BANK

Apr. 25 1914

Centralia, Wash.

(Same Heading. Dated 4 25 14)

Drawee	X	Amount
U		100 00
U		18 82
U		17 04
98 46		407 88

	0 00
	0 00
U	496 00
U	3 52
98 46	11 97
	<hr/>
	1 055 23

U. S. NATIONAL BANK

Apr. 27, 1914

Centralia, Wash. [36]

(Same Heading. Dated 4 27 14)

Drawee	X	Amount
U		61 61
U	X	85 25
98 44	X	100 82
98 46		7 50
Do	X	58 39
Do.		13 22
98 312		25
98 46		40 27
98 312		100
Do.		1 35
98 46		10
98 44		5
98 312		8
		<hr/>
		516 41

U. S. NATIONAL BANK

Apr. 28 1914

Centralia, Wash.

(Same Heading. Dated 4 28 14)

Drawee	X	Amount
98 46		476 20
98 44		249 69
U	X	108 00
U		10 00
98 312	.	45 73
Do.		35 34
U		765 81
		<hr/>
		1 690 77

U. S. NATIONAL BANK

Apr. 29 1914

Centralia, Wash.

Witness further testified that the letter "U" on defendant's Exhibit "B" meant checks drawn on the United States National Bank of Centralia and paid by the Bank of California. Witness could not explain the numerals written under the name "Drawee" on these remittance sheets, other than it was a number given to some certain bank; that such withdrawals might be a check or a charge of any nature, that witness was unable to tell what the item was. [37]

[Testimony of Frank A. Hill, for Plaintiff].

FRANK A. HILL, called as a witness on behalf of the plaintiff, testified as follows:

Present residence was in Centralia, Washington. He was an accountant and assistant to the receiver

(Testimony of Frank A. Hill.)

of the United States National Bank, and had been such ever since the 29th September, 1914. At the close of business on February 4, 1914, there was actual cash in the vaults of the United States National Bank, Centralia, amounting to \$65,914.30. The amount of actual cash, including the lawful reserve and bank bills carried with other banks, including the pennies and mutilated currency, at that time to the credit of the bank was \$78,891.80, which sum was made up of gold, gold certificates, silver certificates, legal tender, certificates, dollars and half dollars in the vaults of that bank.

Plaintiff then introduced in evidence interrogatories Nos. 1, 2, 3, 5, 7, 9 and 15, and the answers thereto, which in substance were as follows:

That on or about February 4, 1915, the United States National Bank records showed that the County Treasurer of Lewis County, Washington, gave to the United States National Bank of Centralia a certain check for \$1,747.04, drawn on Coffman, Dobson & Company, which was given in payment of various warrants, a part of which was owned and held by the United States National Bank; that the United States National Bank records showed that this check, together with other checks, was sent to Coffman, Dobson & Co. The total of said checks, including the check for \$1,747.04, aggregated the sum of \$3,329.38, which amount was charged to the account of Coffman, Dobson & Company by the United States National Bank. That the records of the United States National showed that Coffman, Dobson & Co.

(Testimony of Frank A. Hill.)

credited the account of the United States National Bank with this remittance. That the United States National Bank and Coffman, Dobson & Co. kept reciprocal accounts, that is to say, that if the United States National Bank received checks or drafts upon Coffman, Dobson & Co., those checks and drafts would be sent to Coffman, Dobson & Co., and the United States National would charge [38] on its books the amount to Coffman, Dobson & Co. Coffman, Dobson & Co. would credit on their books the amount to the United States National Bank; and if it was a check or draft drawn on the United States National Bank in favor of Coffman, Dobson & Co., the United States National would, upon receipt of it, give Coffman, Dobson & Co. credit, and Coffman, Dobson & Co. would charge the United States National Bank, the balance often alternating first in favor of one and then the other. That the said check for \$1,747.04 was sent to Coffman, Dobson & Co., and credit given as thus outlined, and that at that time the United States National Bank had a credit with Coffman, Dobson & Co., including these checks, aggregating \$3,329.38, of \$5,046.20. That the United States National Bank, according to its records, received from the County Treasurer on or about April 15, 1914, two checks on the Chehalis National Bank aggregating the sum of \$8,974.18; that the bank records further showed that on April 15, 1914, two checks totaling \$5,363.06, drawn on the Security State Bank of Chehalis, were received by the United States National Bank from the County Treasurer of

(Testimony of Frank A. Hill.)

Lewis County, but that the numbers of these checks were unknown; that the United States National Bank charged the checks to the account of the Security State Bank of Chehalis and sent the checks to that bank, including other items totaling \$7,767.22, thereby reducing the credit balance of the Security State Bank in the United States National Bank; that the Security State Bank of Chehalis credited the account of the United States National with this sum of \$7,767.22; that at that time the United States National Bank had no deposit with the Security State Bank, but that the Security Bank had a deposit with the United States National Bank; that these two checks just referred to were not deposited by the United States National with any other bank. That the United States National Bank never had a credit balance with the Security State Bank; that the records of the United States Bank showed, as to all the checks mentioned in the interrogatories, that in the general ledger of the bank's books under [39] date of August 13, 1913, the following entry appears: \$15,506.18.

[Testimony of Ralph S. Stacy, for Plaintiff.]

RALPH S. STACY, a witness on behalf of plaintiff, testified as follows:

That he was president of the National Bank of Tacoma, which position he had occupied for three years and had been in the banking business for about twenty-seven years, that he was familiar with the requirements of the national banking acts as to reserve funds. That in the year 1914 the legal reserve

(Testimony of Ralph S. Stacy.)

consisted of gold coin, gold certificates, silver coin, silver certificates and balances in reserve cities in approved reserve agents. That the balance carried by the United States National Bank of Centralia would be divided in this way. Their legal reserve would be balances carried in other national banks in reserve cities which had been duly approved by the Comptroller, and that any other balances that the bank might carry in other cities would not be legal reserve but actual reserve; thus an account of \$20,000 in the Fidelity Trust Company would not be legal but would be actual reserve; that it was very usual with banks situated as the United States National was to carry reserve which was actual but not legal. That both actual and legal reserve is usually created by remittance checks for credit with some other bank, which are available by draft or by request for shipment of coin; that these reserves were available usually by draft and not by the shipment of coin. That the United States National had a credit balance with their bank along in August, and that it was customary to draw a draft against that credit, and the witness thought such a draft had been sent to Seattle, but there was no transfer of bullion at that time and it was a mere exchange of credit balances. That the custom was, if the Centralia Bank should draw a draft for \$10,000 on one of its reserve banks, they would naturally make a corresponding credit [40] on their books; and if one of the reserve agents sent a remittance letter including a lot of checks to the United States National Bank, the

United States National would credit its account. If a bunch of checks were sent to Centralia and if they were all good, the Centralia Bank would credit the other bank's account on their books, that it was customary, if a draft should be drawn by the United States National on his bank or on a reserve agent and paid by him or the reserve agent, that it would be charged to the account of the United States National and held by him as an entry until the end of the month and then sent back, just the same as anyone's checks are sent back at the end of the month, with a statement. That there would be a corresponding entry on the books of the United States National. On cross-examination witness testified that the relation between the United States National and its correspondent or reserve bank would be simply that of depositor and creditor, just the same as any ordinary customer of a bank in the deposit of money, and that it was simply a question of balances, debits and credits. The lawful reserve of banks situated as the United States National could be created either by carrying the actual gold coin in its vaults or by carrying 6/15ths of its necessary reserve in the form of balances in what was known as reserve centers, that these balances with reserve centers meant that the United States National was simply a depositor in such reserve centers. That in addition to this lawful reserve, the bank might have actual reserve, which might consist either of gold in its vaults in excess of 15% or it might consist of moneys other bankers might owe it.

**[Testimony of Frank A. Hill, for Plaintiff
(Recalled).]**

FRANK A. HILL, again introduced as a witness on behalf of plaintiff, testifies that he had made a tabulation of the lowest amount of cash and cash items on hand and the balance in reserve agents and the balances in banks not reserve agents had by the United States National Bank, which tabulation was thereupon introduced [41] in evidence as Complainant's Exhibit No. 8, and which exhibit is as follows:

**[Complainant's Exhibit No. 8—Tabulation of
Lowest Amount of Cash and Cash Items in
Vaults.]**

**UNITED STATES NATIONAL BANK OF CEN-
TRALIA, WASH.**

Lowest Amount of Cash and Cash Items in Vaults, Sept. 17th, 1914,		
\$23,527.86	.....	\$23,527.86
Cash	.....	\$22,464.30
Cash Item	.....	1,063.56
Balance with Reserve Agent Sept. 17th, 1914		
	.....	\$45,613.94
Balance with Banks not Reserve Agents, Sept. 17th, 1914		
	.....	21,486.16
		<hr/>
Total		\$90,627.96
Lowest Balance with Reserve Agents, Mar. 6th, 1914		
	.....	21,035.38

Cash:

Actual Cash in Vaults.	\$55,307.35	
Cash Items	11,594.72	66,902.07
Balance with Banks not Reserve Agents		18,030.80
		<hr/>
Total		105,986.25

Lowest Balance in Banks not Reserve

Agents, June 25, 1914	6,623.48
-----------------------------	----------

Cash:

Actual Cash in Vaults	\$40,556.75	
Cash Items	7,402.14	47,958.89
Balance with Reserve Agents		141,928.21
		<hr/>
Total	\$196,510.58	

The Lowest Amount of Cash and Cash
Items on Hand and Balances in Re-

serve Agents, Sept. 16, 1914.....	71,971.52
Balance in Banks not Reserve Agents	29,600.95
	<hr/>
	\$101,572.47

The Lowest Amount of Cash and Cash
Items on Hand and Balances with
Banks not Reserve Agents, Sept. 17,
1914

	45,014.02
Lowest Amount of Cash and Cash Items on Hand and Balances in All Banks, Sept. 17, 1914.....	90,627.96

[42]

That the lowest amount, of the above aggregate sums, that is, actual cash, cash items, balances with reserve agents, and balances with banks not reserve agents,

(Testimony of Frank A. Hill.)

after February 4, 1914, to date of closing, was \$90,627.96, distributed as follows:

Actual cash.....	\$22,464.30
Cash items.....	1,063.56
Balance with reserve agents.....	45,613.94
Balance with banks not reserve agents	21,486.16

When the bank closed there was actual cash on hand of \$27,899.81, and there were cash items of \$4,539.63. The balance with bank's reserve agents \$45,613.94, the balance with banks not reserve agents \$21,486.16, making a total of \$90,627.96. On cross-examination the witness testified that cash items were made up of checks on individuals, that none of these items were actually cash, that they might be represented by running expense of the bank or by various choses in action, some of which might be collected and some of which could not.

It was admitted that the plaintiff McCormick was a citizen of the Western District of Washington.

[Testimony of George B. Frye, for Plaintiff.]

GEORGE B. FRYE, produced as a witness on behalf of plaintiff, testified as follows:

That he lived in Tacoma, was employed by the plaintiff, Mrs. McCormick, as a bookkeeper and to some extent to look after her investments; that he had examined the warrants which she had purchased from the United States National and had listed them at the time of purchase, and that he was looking after the collection of them; that some week or ten days before the bank closed he had a conversation

(Testimony of George B. Frye.)

with Mr. Gilchrist, in which Gilchrist stated in effect that a part of the warrants were being called, or being paid, at that time, or were about to be paid; that prior to that time he had had no conversation with Gilchrist relative to the payment of the warrants, but he had called up the bank six weeks before that and was notified that the warrants were not paid. He did not know prior to the bank's failure that the warrants had been called and the bank paid. [43]

The defendant thereupon introduced in evidence a letter written by the plaintiff McCormick to the Bank Examiner in charge of the United States National under date of September 24, 1914, in which the plaintiff recited the purchase of these warrants from the bank, and that they were returned by her to the bank for collection, to be collected by the bank and remitted to her, less the interest accruing to the bank under the agreement, up to August 18, 1913 (Defendants' Exhibit "C").

It was admitted that the assets of the bank were insufficient to pay all creditors in full, and that after an assessment of 100% had been levied upon the capital stock of the bank and upon all stockholders, that the assets would not be sufficient to pay creditors in full.

Defendant then introduced in evidence (Defendant's Exhibit "D") various bills of complaint pending in the United States District Court for the Western District of Washington, Southern Division, the substance of which bills was as follows:

1. City of Centralia, a municipal corporation, vs.

(Testimony of George B. Frye.)

United States National Bank and A. R. Titlow, Receiver, Equity No. 25, in which the plaintiff seeks to establish a preferred claim against the assets of the bank in the sum of \$44,553.09, representing the proceeds of certain city bonds which were deposited with the bank in July, 1914. Trust in favor of plaintiff asserted on the ground that the bank had failed to furnish the bond required by law from depositories of city funds.

2. Continental & Commercial National Bank of Chicago, a corporation, vs. A. R. Titlow, Receiver, and United States National Bank, Equity No. 38, in which plaintiff seeks to establish a preferred claim against the assets of the bank in the sum of \$5,166.67, representing the proceeds of a note alleged to have been forwarded to the United States National Bank in August, 1914, for collection and remittance. Complaint alleges bank collected but failed to remit.

3. Frank P. McKinney as Receiver of Olympia Bank & Trust Company vs. A. R. Titlow, Receiver, Equity No. 32. Suit for \$56,050, [44] of which \$36,550 is alleged to be a preferred claim, on the ground that one Hayes, the cashier of the Olympia Bank & Trust Company, transferred that amount to the United States National in August, 1914, in order to deceive the United States National Bank Examiner; that the United States National Bank promised to return this fund as soon as the United States National Bank Examiner had inspected the United States National, but that no part of the amount has been returned to the Olympia Bank.

(Testimony of George B. Frye.)

4. Nicholas V. Petrinovich vs. A. R. Titlow, Receiver, Equity No. 37. Complaint alleges plaintiff deposited check for \$150 on September 15, 1914, with the United States National Bank for collection only; that collection was made and the bank has the money but refuses to pay plaintiff. Preferred claim asserted.

5. John E. Sundquist vs. A. R. Titlow, Receiver of United States National Bank, et al., No. 1693. Preferred claim for \$1296 asserted against the receiver. Complaint alleges that amount deposited with the United States National Bank on August 31, 1914, for a special purpose, namely, to pay a certain mortgage due from the defendant Walter Gustafson to the defendant Izella J. Smith; that the mortgage was not paid nor the money or any part of it returned to the plaintiff. Decree for plaintiff for \$1296 and costs entered February 15, 1915. [45]

Defendant then introduced in evidence interrogatory No. 8 and the answer thereto, which in substance was that the check of the County Treasurer, which was given in part payment of these warrants which went to the bank of Coffman Dobson & Co., was deposited in the bank of Coffman Dobson & Co., along with other checks, and all were credited to the account of the United States National Bank; that between the time of the sending of that check to Coffman Dobson & Co. and the closing of the United States National Bank, the credit of the latter bank with Coffman Dobson & Co. was naturally wiped out,

(Testimony of George B. Frye.)

and the credit of the United States National Bank in favor of Coffman Dobson & Co. reached on April 14, 1914, the sum of \$20,169.97, which was the lowest amount of credit the United States National Bank had with Coffman Dobson & Co. This credit being in favor of Coffman-Dobson & Co. to that amount, there were no offsets to this, as the United States National Bank's Credit with Coffman Dobson & Co. was entirely wiped out by the ordinary debits and credits in exchange of business, and a charge against the United States National Bank in favor of Coffman Dobson & Co. had accumulated to the extent of \$20,169.97.

Defendant then introduced in evidence interrogatory No. 9 and the answer thereto, which in effect was that on or about April 15, 1914, the United States National Bank, according to the records, received from the Treasurer of Lewis County these two checks, aggregating \$8974.18, drawn on the Chehalis National Bank.

[Testimony of Frank A. Hill, for Defendant (Recalled)].

FRANK A. HILL, who had previously testified on behalf of the plaintiff, was then called as a witness on behalf of the defendant and testified that Plaintiff's Exhibit No. 5, which was a check of [46] the Treasurer of Lewis County drawn on Coffman Dobson & Co., and payable to the order of the United States National Bank, for \$1,747.04, was received by the United States Bank in exchange for the face and interest of five warrants, four of which warrants are

(Testimony of A. R. Titlow.)

enumerated in the third paragraph of the complaint, and the fifth warrant was one for \$87.50, which was the property of the United States National Bank. This check was sent by the United States National Bank in its remittance of February 6 to Coffman Dobson & Co., which remittance, including this item or check in question and other items, amounted to \$3,329.38.

The defendant then introduced in evidence the remittance sheet testified to by the witness, being Defendants' Exhibit "E," and which is as follows:

[Defendant's Exhibit "E"—Remittance Sheet.]

Remittance Sheet When Credited.

United States National Bank.

Centralia, Wash., 2-6 191—

Coffman Dobson Co.,

Chehalis.

The United States National Bank

PAID Feb. 11, 1914.

Centralia, Wash.

We enclose for collection and credit.

Items marked X no protest. Items of \$10 and under no protest. Please wire advice of non-payment items \$100 or over.

Respectfully,

J. W. DAUBNEY, Cashier.

Last

Date.	No.	Drawn by.	Favor of.	Endorser.	Amount.
4	1228	J. M. Jensen	Gas		.50
3	973	Sister M. Ambrose	"		5.45
2	741	K. A. Ludwig Co.	"		6.83
3	2376	D. W. Bush	"		1.98
5	424	W. J. Botsford	"		2.64
5		C. W. Hanson	"		3.33
5	20254	Doty L. & Shg.	Pac. T. & T.		16.45
3		Bernice Gabe	Gas		3.96
4		Mrs. W. H. Cory	"		.50
2	488	S. C. White	"		2.84
4		Leona Tramhill	"		2.81
4		Sam Johnson	Mrs. S. J.	Gas	10.
6	281	E. J. Gleason	Stackhouse Piano		10.
4	2473	Arnold, Treas.	Us		1747.04
				FWD.	1515.05

Just before this remittance was made to Coffman Dobson & Co., and at the close of business the day previous to sending that remittance, Coffman Dobson & Co. owed the United States National Bank a balance of \$3,180.79. After this remittance of \$3,329,-38, the state of the account between the two banks was that the Coffman Dobson & Co. owed the United States National Bank a balance of \$5,046.20. From that time until the close of business on February 14, 1914, the state of the account between these two banks was as follows: At the close of business February 7, 1914, Coffman Dobson & Co. owed the United States National \$6,053.43. The 8th was Sunday. On the 9th, \$1,821.59; on the 10th, \$798.68; on the 11th, \$1,067.53; on the 13th, \$2,264.33; on the 14th, the United States National Bank owed Coffman Dobson & Co. a balance of \$489.80. That was on February 14, 1914. That during this period all checks which Coffman Dobson cashed on the United States National and other Centralia banks were charged to the account of the United States National by Coffman Dobson, and all checks which it, the United States National, cashed on them, were charged to their account by the United States National; that the credit balance which the United States National had with Coffman Dobson up to February 14 was wiped out by the payment of the creditors and depositors of the United States National bank.

Witness was then shown Plaintiff's Exhibits 6 and 7, being respectively the checks drawn by the County Treasurer of Lewis County, on the Security State

Bank of Chehalis to the order of the United States National Bank of Centralia, one being for \$3,598.00 and the other for \$1,765.06, both dated April 14, 1914. The witness testified that the records of the United States National Bank disclosed that these two checks were sent to the United States National Bank by the County Treasurer of Lewis County on April 15, and on that day were forwarded to the Security State Bank of Chehalis by the United States National in remittance including these two checks and other checks, which remittance aggregated \$7,767.22, this remittance being [48] charged to the account of the Security Bank. Thereupon defendant introduced in evidence the remittance sheet referred to by the witness, which was marked Defendant's Exhibit "F," and which is as follows:

[Defendant's Exhibit "F"—Remittance Sheet.]

Remittance Sheet When Credited.

United States National Bank.
Centralia, Wash., Apr. 15, 1914,
Security State,
Chehalis.

The United States National Bank.

PAID Apr. 17, 1914.

Centralia, Wash.

We enclose for collection and credit.
Items marked X no protest. Items of
\$10 and under no protest. Please
wire advice of non-payment items
\$100 or over.

Respectfully,

J. W. DAUBNEY, Cashier.

Date.	No.	Drawn by.	Favor of.	On.	Amount.
14	429	Treas. Office	Us	You	1765.06
14	428	"	"	"	3598.00
14	426	"	"	"	2392.98
11	227	Table Supply Co.	Jas. & Jas.	"	11.18
					<hr/> 7767.22

At the time of this remittance, the Security State Bank of Chehalis was a creditor of the United States

ness on April 14, which was the day just prior to the sending of this remittance, the United States National owed the Security Bank a balance of \$13,476.04. After this remittance, as shown by Defendants' Exhibit "F," was sent to the Security State Bank, the United States National still owed the Security Bank \$5,985.99. Witness's attention was thereupon called to Exhibits Nos. 3 and 4, which were respectively the checks drawn by the treasurer of Lewis County on April 14, 1914, on the Chehalis National Bank, payable to the order of the United States National Bank, one being for \$4,061.77, and the other being for \$4,912.41. The witness testified that these two checks were received by the United States National on or about April 15, and were forwarded by that bank to the Bank of California in remittance including other checks, which totaled \$19,198.02. Defendant then introduced the original [49] remittance sheet showing this remittance, which was marked Defendant's Exhibit "G," and which is as follows:

Just prior to this remittance, and at the close of business on April 14, 1914, the state of the account between the United States National and the Bank of California was that the Bank of California owed the United States National a balance of \$1,305.01. The remittance was sent on the 15th. The balance due the United States National by the Bank of California at the close of business on April 15, was \$11,837.49; on the 16th, \$16,617.87; on the 17th, \$14,198.76; on the 18th, \$13,391.95; on the 20th, \$3,070.37; on the 21st, \$10,806.91; on the 22d, \$5,745.25; on the 23d, \$13,046.41; on the 24th, \$8,641.24; on the 25th, \$3,567.35; on the 27th, \$592.40; on the 28th of April, 1914, this account was overdrawn, and the United States [50] National Bank of Centralia owed the Bank of California a balance of \$6,469.28. When the United States National sent a remittance, it would be posted on the books of the United States National the day it was sent by that bank, and the posting on the books of the Bank of California would probably occur the next day; that in the balancing and interchange of debits and credits, the sending bank would credit on the day it was sent and the receiving bank would credit on the day it was received. That the balance that the United States National had with the Bank of California between April 14 and April 27, 1914, which was the day on which the account was overdrawn, was used by the United States National Bank to pay the creditors of that bank. That whenever the Bank of California honored checks that were drawn on banks in Centralia, they were charged to the account of the United States National, and when

the United States National drew drafts on the Bank of California, credit was given to the Bank of California for the amount of those drafts; that if the United States National desired to pay some one in Chicago or New York \$5,000 and drew a draft on the Bank of California and sent it to Chicago or New York, it would naturally reduce the balance that the United States National had with the Bank of California.

Witness further testified that an assessment of 100% on all stockholders had been made in the bank; that the assets of the trust would be insufficient to pay creditors in full.

On cross-examination witness testified that the United States National's account with Coffman Dobson was overdrawn on April 14, 1914; that on that date the amount of actual cash in the vaults of the United States National was \$66,381.40; that the amount of cash items on that date was \$4,654.85.

Witness further testified that he had the original remittance sheets which showed how the credit with Coffman Dobson & Co. was exhausted by the United States National, that these remittance sheets showed [51] the payment of checks by Coffman Dobson which were drawn on the United States National, on the Tenino, Union Loan & Trust Company, Field & Lease, and Farmers' & Merchants' Bank; that none of these checks or items shown in these remittance sheets were drawn on reserve agents of the United States National.

Witness was then asked if he knew how many checks or drafts that were honored by the Bank of

California, which caused the reduction of the credit balance of the United States National Bank to an overdraft on April 28, 1914, were drawn on reserve agents of the United States National Bank of Centralia. Witness answered that none of the checks shown in these remittance sheets, and which were honored by the Bank of California, were drawn on reserve agents of the United States National Bank; that of course the drafts which were drawn on the Bank of California were drawn on a reserve agent, because that bank was a reserve agent of the United States National; that the drafts so drawn by the United States National on the Bank of California were used in paying creditors of the first bank; for instance, the National Bank of Tacoma, on April 13 honored a number of checks drawn on the United States National Bank of Centralia and other banks in Centralia, and forwarded them to the United States National Bank of Centralia. In exchange for this remittance or collection by the National Bank of Tacoma, the United States National sent back to the National Bank of Tacoma a draft drawn on the Bank of California in payment of these items. The amount of this draft, which was dated April 15, was \$6,340.55. As to the other drafts, witness said that they were drawn in favor of the National Bank of Tacoma, The Fidelity Trust Company of Tacoma, Field & Lease, D. J. Williams, a small one of \$6.00, D. J. Williams for \$27.50, one Carrigan for \$250.00, Coffman Dobson & Company, \$8,514.00, which completed the list of the drafts as shown in these remittance sheets. [52]

Witness further testified that the United States National drew no drafts on Coffman Dobson & Co.; that the United States National and the Security State Bank of Chehalis did not carry reciprocal accounts, because the Security Bank always kept a balance with the United States Bank, and that when the two checks which witness had first testified to were sent by the United States National to the Security Bank, it simply reduced the amount that the United States National owed the Security.

On redirect examination, witness testified that as to answer to interrogatory No. 8 he desired to make a correction, that the interrogatory stated that the lowest amount of credit which the United States National Bank of Centralia had with Coffman Dobson & Co., was reached on April 14, at which time the United States National Bank of Centralia owed Coffman Dobson & Co. \$20,169.97; that while this was true and that that was the lowest amount, yet the United States National owed Coffman Dobson \$489.-80 in Feb. 14th, which was the first time that the United States National began to owe them after the checks were sent down to them.

On recross-examination witness testified that the amount of cash in the vaults of the United States National Bank of Centralia at the close of business on February 14, 1914, was \$66,381.40; cash items on hand at that date, \$4,654.85; balance in reserve agents at that time, \$50,295.18; amount of balance with banks not reserve agents on that date, \$17,404.-98. On April 15, 1914, the United States National had actual cash in its vaults of \$53,366.70; cash items

\$10,787.02; balance with reserve agents, \$80,911.78; balance with banks not reserve agents, \$32,935.91; making a total of \$178,011.41. On April 28, 1914, the date on which the credit of the U. S. National Bank of Centralia with the Bank of California was exhausted, the amount of actual cash in the vaults of the United States National Bank was \$34,097.05; cash items, \$22,143.68; balance with reserve agents, \$50,012.17; balance with banks not reserve agents, \$32,696.22, making a total of \$138,949.12. [53]

Thereupon plaintiff introduced in evidence Plaintiff's Exhibit No. 9, which is as follows:

[Plaintiff's Exhibit No. 9—Tabulation of Amount of Money in Vaults.]

**UNITED STATES NATIONAL BANK OF
CENTRALIA, WASHINGTON.**

Feb. 14, 1914.

Amount of actual each in vaults of	
bank.....	\$ 66,381.40
Amount of cash items on hand.....	4,654.85
Amount of Balance in Reserve	
Agents.....	50,295.18
Amount of Balance with Banks not	
reserve agents,.....	17,404.98
<hr/>	
Total.....	\$138,736.41

April 15th, 1914.

Amount of actual cash in vaults of	
bank.....	\$ 53,366.70
Amount of cash items on hand.....	10,787.02

Amount of Balance with Reserve	
Agents.....	80,911.78
Amount of Balance with Banks not	
Reserve Agents,....	32,935.91
<hr/>	
Total.....	\$178,011.41

April 28th, 1914.

Amount of actual cash in vaults of	
bank... ..	\$ 34,097.05
Amount of cash items on hand.....	22,143.68
Amount of Balance with Reserve	
Agents.....	50,012.17
Amount of Balance with Banks not	
Reserve Agents,... ..	32,696.22
<hr/>	
Total.....	\$138,949.12

On redirect examination witness testified that the United States National Bank did a general banking business subsequent to February 14, 1914, and up to and including September 19, 1914, and as such received deposits in the ordinary course of business; that from July 29 down to the time that the bank failed, there was deposited [54] in actual cash in that bank approximately \$129,000.

[Testimony of A. R. Titlow, for Plaintiff.]

A. R. TITLOW, a witness produced on behalf of plaintiff, testified that he was the present receiver of the United States National Bank. That his predecessor was C. A. Snowden, whose predecessor in turn was one Chapman; that there had been collected by the various receivers of the trust up to the present time about \$200,000. [55]

Order (Settling Statement of Evidence).

This matter coming on regularly upon stipulation of all parties that the statement of the testimony and evidence in this case may be certified as to true and correct; now on this day, I, Edward E. Cushman, Judge of the above-entitled court, and the Judge before whom the above case was tried, do hereby certify in accordance with said stipulation, of all parties on file herein, that the foregoing is a true and correct and complete statement of all the evidence essential to the decision of the case presented by the appeal of the defendants from the judgment entered in favor of the plaintiff. That the foregoing statement is true, complete and properly prepared and I do hereby approve the same as the statement of the evidence in such matter for the purpose of said appeal, and do hereby order that the same become a part of the record for the purpose of the appeal.

Dated September 11th, 1915.

EDWARD E. CUSHMAN,
Judge.

(Filed Sept. 11, 1915.) [56]

[Title of Court and Cause.]

Petition for Appeal.

Come now the defendants A. R. Titlow, Receiver of the United States National Bank of Centralia, and the United States National Bank of Centralia and feeling themselves aggrieved by the final decree entered in the above-entitled court and cause on the 2d day of August, 1915, do hereby appeal from said

decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith and pray that this appeal may be allowed and that a transcript of the record proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California.

FREDERICK BAUSMAN,
R. P. OLDHAM,
R. C. GOODALE,
Solicitors for Defendants.

(Filed Aug. 23, 1915.) [57]

[Title of Court and Cause.]

Assignment of Errors.

Now on this 23d day of August, come the defendants, A. R. Titlow, Receiver of the United States National Bank of Centralia, by their solicitors Frederick Bausman, R. P. Oldham and R. C. Goodale, and say that the decree entered in the above cause on the 15th day of February, 1915, is erroneous and unjust to them:

I.

Because the District Court erred in finding and adjudging that the deposit of plaintiff's warrants with the defendant United States National Bank of Centralia for collection and remittance was sufficient to establish a trust relation between plaintiff and the defendant bank on the bank's failure to remit the proceeds of such warrants when collected, and not merely a relation of debtor and creditor.

II.

Because the District Court erred in ordering and directing the defendant A. R. Titlow, Receiver of the United States National Bank of Centralia, to pay to the plaintiff the sum of Ten Thousand Fifty-four and 69/100 Dollars or any other sum as a preferred claim out of the assets of the United States National Bank of Centralia. [58]

III.

Because the District Court erred in rendering a decree allowing a preferred claim to the plaintiff in the sum of \$10,054.69, which decree is contrary to the testimony and against the law because the equities of the case entitled the defendants to a decree of dismissal.

WHEREFORE the defendants pray that the decree be reversed and the District Court be directed to dismiss the bill and for such other relief as the defendants are entitled to in equity.

FREDERICK BAUSMAN,

R. P. OLDHAM,

R. C. GOODALE,

Solicitors for Defendants.

(Filed Aug. 23, 1915.) [59]

[Title of Court and Cause.]

Order Allowing Appeal.

The above-named defendants having heretofore filed their assignment of errors and petition for appeal from the final decree herein and it appearing that the defendant has been directed by the Comp-

troller of the Currency of the United States of America to take such appeal; now, therefore, it is hereby

ORDERED that the petition for appeal be granted and the appeal is hereby allowed. It is

FURTHER ORDERED that the defendants shall not be requested to furnish any security upon said appeal.

Dated this 23d day of August, 1915.

EDWARD E. CUSHMAN,
Judge.

(Filed Aug. 23, 1915.) [60]

[Title of Court and Cause.]

**Certificate (of Comptroller of the Currency)
Directing Appeal.**

To A. R. Titlow, Receiver of the United States National Bank of Centralia, and United States National Bank of Centralia:

You are hereby directed to appeal to the Circuit Court of Appeals for the Ninth Circuit from the judgment of the District Court for the Western District of Washington, Southern Division, entered in the above-entitled cause on August second, 1915.

WITNESS the Honorable John Skelton Williams, Comptroller of the Currency, this 23d day of August, 1915.

JOHN SKELTON WILLIAMS,
Comptroller of the Currency.

[Seal]

By W. J. Fowler,
Acting Comptroller.

(Filed Aug. 30, 1915.) [61]

[Title of Court and Cause.]

Notice of Filing Defendants' Proposed Statement of Evidence.

To Anna E. McCormick, Plaintiff, and Hayden, Langhorne & Metzger, Esquires, her Attorneys:

You will please take notice that we have on this 23d day of August, 1915, lodged in the office of the clerk of the above-named court for your examination the statement of the evidence herein proposed by the defendant A. R. Titlow, Receiver of the United States National Bank to be included in the record on appeal in this cause.

AND YOU WILL PLEASE TAKE NOTICE that on the 3d day of September, 1915, at 10 o'clock A. M. at the courthouse of the above-named court in Tacoma, Washington, we will ask the court or Judge to approve the statement hereinbefore mentioned, a copy of which is herewith served upon you.

BAUSMAN, OLDHAM & GOODALE,
Solicitors for the Defendant A. R. Titlow, Receiver
of the United States National Bank of Centralia.

We hereby admit service of the above notice and acknowledge the receipt of a copy of defendants' proposed statement of evidence this 23d day of August, 1915.

HAYDEN, LANGHORNE & METZGER,
Solicitors for Plaintiff.

(Filed Aug. 23, 1915.) [62]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing pages numbered from 1 to 62 inclusive, constitute a full, true and correct transcript of the record and proceedings in the case of Anna E. McCormick vs. A. R. Titlow, Receiver of the United States National Bank of Centralia, and the United States National Bank of Centralia, No. 24—E. lately pending in this court, as required by the praecipe of counsel filed in said cause, as the originals thereof appear on file in this court, at the City of Tacoma, in the District aforesaid.

I further certify and return that I hereto attach and herewith transmit the original Citation.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees, and charges incurred and paid in my office, by and on behalf of the appellant herein, for making the record, certificate and return to the United States Circuit Court of Appeals, for the Ninth Circuit, in the above-entitled cause, to wit:

Clerk fees (Sec. 828 R. S. U. S.) for record, certificate and return, 151 folios @ 15¢ ea.....	\$22.65
Certificate of Clerk to Transcript, 3 fo. @ 15¢.....	.45
Seal to said Certificate.....	.20

ATTEST my hand and the seal of the United States District Court for the Western District of Washington, at Tacoma, [63] this 15th day of September, A. D. 1915.

[Seal]

FRANK L. CROSBY,
Clerk.

By E. C. Ellington,
Deputy Clerk. [63½]

*In the District Court of the United States for the
Western District of Washington, Southern Di-
vision.*

IN EQUITY—No. —.

ANNA E. McCORMICK,

Plaintiff,

vs.

A. R. TITLOW, as Receiver of the UNITED STATES NATIONAL BANK OF CENTRALIA, and the UNITED STATES NATIONAL BANK OF CENTRALIA,

Defendants.

Citation on Appeal—(Original).

United States of America to ANNA E. McCORMICK, Plaintiff, Greeting:

You are hereby notified that in the above-entitled proceeding had in the United States District Court for the Western District of Washington, Southern Division, an appeal has been allowed to the defendants A. R. Titlow, Receiver of the United States National Bank of Centralia, and the United States National Bank of Centralia to the United States

Circuit Court of Appeals for the Ninth Circuit from the final decree entered in said cause, and you are therefore hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco in the State of California within thirty days from the date of this citation, to show cause, if any there be, why the said final decree appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States this 23d day of August, 1915.

[Seal]

EDWARD E. CUSHMAN,

Judge. [64]

Copy of the within citation received and due service of the same acknowledged, this 23d day of August, 1915.

HAYDEN, LANGHORNE & METZGER,

Attorneys for Plaintiff.

[Endorsed]: In Equity. No. ——. In the District Court of the United States for the Western District of Washington, Southern Division. Anna E. McCormick, Plaintiff, vs. A. R. Titlow, Receiver, et al., Defendants. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Aug. 23, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

[Endorsed]: No. 2653. United States Circuit Court of Appeals for the Ninth Circuit. A. R. Titlow, as Receiver of the United States National Bank of Centralia, and the United States National Bank of Centralia, Appellants, vs. Anna E. McCormick, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed September 17, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

A. R. TITLOW, as Receiver of the
UNITED STATES NATIONAL
BANK OF CENTRALIA, and the
UNITED STATES NATIONAL
BANK OF CENTRALIA,

Appellants,

vs.

ANNA E. McCORMICK,

Appellee.

Filed

FEB 16 1911

F. D. [unclear] [unclear]

BRIEF OF APPELLANTS

Upon Appeal from the United States District Court
for the Western District of Washington,
Southern Division.

R. P. OLDHAM,

R. C. GOODALE,

Attorneys for Appellants.

1408 Hoge Building,
Seattle, Washington.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

A. R. TITLOW, as Receiver of the
UNITED STATES NATIONAL
BANK OF CENTRALIA, and the
UNITED STATES NATIONAL
BANK OF CENTRALIA,

Appellants,

vs.

ANNA E. McCORMICK,

Appellee.

BRIEF OF APPELLANTS

Upon Appeal from the United States District Court
for the Western District of Washington,
Southern Division.

R. P. OLDHAM,
R. C. GOODALE,
Attorneys for Appellants.

1408 Hoge Building,
Seattle, Washington.

STATEMENT.

In August, 1913, the plaintiff, Mrs. McCormick, purchased of the United States National Bank of Centralia some \$15,000.00 worth of school district warrants. After the purchase, she returned these warrants to the bank for collection (Tr. of R. 30). On February 4, 1914, a number of the warrants being called for payment, the bank forwarded them to the county treasurer and received in payment a check of \$1,747.04. The check was drawn on Coffman, Dobson & Co., bankers at Chehalis, Washington, and was payable to the United States National Bank (Tr. of R. 30). On April 14, the balance of the warrants being called, the bank forwarded them to the county treasurer and received four additional checks, all payable to the order of the United States National and signed by the treasurer of Lewis County. The five checks thus received by the United States National in exchange for the warrants took three different courses.

1. *The Coffman Dobson Check.* This check (Exhibit 5, p. 33) for \$1,747.04 was drawn on Coffman, Dobson & Co., bankers, payable to the United States National Bank, indorsed by it and sent in remittance of February 6th, containing other items amounting to \$3,329.38, to Coffman, Dobson & Co. for credit account U. S. National (58).

The state of the account between Coffman, Dobson & Co. and the U. S. National *after* this remittance on February 6th, showed that Coffman, Dobson & Co. owed the U. S. National a balance of \$5,046.20. From that day forward to February 14, 1914, Coffman, Dobson & Co. owed the U. S. National Bank as follows:

February	7,	\$6,053.43
"	8,	Sunday
"	9,	1,921.59
"	10,	798.68
"	11,	1,067.53
"	12,	Holiday
"	13,	2,264.33

On February 14, the credit of the U. S. National with Coffman, Dobson & Co. *was entirely wiped out. On that date the U. S. National Bank owed the Coffman Bank* \$489.80 (59). During the period from February 6 to February 14, the Coffman Bank was a correspondent of the U. S. National, and all checks which the Coffman bank cashed on the U. S. National and other Centralia banks were charged to the account of the U. S. National by the Coffman bank, and all checks which the U. S. National cashed on the Coffman bank were charged to the Coffman Bank's account with the U. S. National, so that the credit which the U. S. National had with Coffman, Dobson & Co. during that period was utilized by the payment of creditors and depositors of the U. S. National. (59).

The credit with the Coffman bank was exhausted by the U. S. National by the payment of checks by Coffman, Dobson & Co., which were drawn on the U. S. National and other banks. None of the checks or items which exhausted this account were drawn on reserve agents of the U. S. National (64), and no drafts of the U. S. National were cashed by the Coffman bank during that period. (66)

2. *Chehalis National checks.* Two checks (Exhibits 3 and 4, pp. 31 & 42), aggregating \$8,974.18, were drawn by the county treasurer on the Chehalis National Bank and payable to the U. S. National, and indorsed and deposited by it in the Bank of California at Tacoma. These checks were received by the U. S. National on April 15 (61) and were forwarded by that bank to the Bank of California in a remittance including other checks, which totaled \$19,198.02. (61) Just prior to this remittance and at the close of business on April 14, the Bank of California owed the U. S. National a balance of \$1305.01. This remittance was sent on April 15 (63). After this remittance was received by the Bank of California, according to the books of *that bank*, the credit balance of the U. S. National in the Bank of California was \$3642.20 (35). According to the books of the U. S. National, the balances of that bank with the Bank of California on the respective dates were as follows:

April 15,	\$11,837.49
" 16,	16,617.87
" 17,	14,198.76
" 18,	13,391.95
" 19,	Sunday
" 20,	3,070.37
" 21,	10,806.91
" 22,	5,745.25
" 23,	13,046.41
" 24,	8,641.24
" 25,	3,567.35
" 26,	Sunday
" 27,	592.40

On April 28 the account was *overdrawn* and the U. S. National *owed* the Bank of California \$6469.28.

This credit balance from April 15 to April 28, with the Bank of California was utilized by the U. S. National in its ordinary course of business. The remittance sheets during that period showed that *none of the balance was transferred to reserve agents.* (65) Remittance sheets of the Bank of California to the U. S. National between the dates of April 14 and April 28, when the credit was exhausted (defendant's Exhibit B, 37), showed that the balances in favor of the U. S. National with that bank were utilized by the California bank's honoring checks drawn by depositors of the U. S. National, and in some few instances, indicated by numeral, the transfer of credits to other banks, for instance, the National Bank of Tacoma on April 13, honored a number of checks drawn on the U. S. National and forwarded them to the U. S. Na-

tional. In exchange for this remittance or collection by the Tacoma bank, the U. S. National sent to the Tacoma bank a draft on the Bank of California in payment of these items. The amount of this draft, which was dated April 15, was \$6340.55. (65). The letter "U" on the remittance sheets indicated checks drawn on the U. S. National and cashed by the Bank of California (45)

Security State Bank checks. Two checks, aggregating \$5363.06, drawn by the county treasurer on the Security State Bank of Chehalis, payable to the order of the U. S. National. These checks were sent by the U. S. National to the drawee bank in a remittance which aggregated \$7767.22. Prior to this remittance the U. S. National owed the Security Bank a balance of over \$13,000.00, and after this remittance the U. S. National still owed the Security Bank \$5985.99. (61)

The U. S. National was declared insolvent by the Comptroller on September 21, 1914, and a receiver appointed that day. At the time of its failure there was actual cash in the vaults of the bank of \$27,899.81. Between February 4 and the date of its failure, the lowest amount of cash and cash items in the vaults of the bank was, September 17, 1914, \$23,527.86. (53). From July 29 to the date that the bank

failed, there was deposited in the bank in actual cash by ordinary depositors, over its counter, \$129,000. (68).

Mrs. McCormick sought to enforce a preferential payment to her of some \$15,000.00, being the proceeds of all the warrants so collected by the U. S. National. The trial court eliminated from the plaintiff's claim to preference the amount of the two checks which were deposited by the U. S. National with the Security State Bank of Chehalis, aggregating \$5363.96, and held as to that amount plaintiff was a general creditor. As to the balance of the proceeds of the collections above enumerated, passing to Coffman, Dobson & Co. and the Bank of California in Tacoma, the trial court allowed the preference.

Five other suits are pending against the insolvent, in which the respective plaintiffs are asserting preferential claims. (54). These five other suits involve \$107,215.76. From that portion of the decree which allows Mrs. McCormick a preference of \$10,054.69, this appeal is prosecuted.

It will be observed that the questions presented by this appeal are limited to the transactions of the U. S. National with the Coffman, Dobson Co., and the Bank of California at Tacoma.

SPECIFICATION OF ERRORS.

1. The District Court erred in finding and adjudging that the deposit of the plaintiff's warrants with the defendant bank for collection and remittance was sufficient to establish a trust relation between the plaintiff and defendant bank on the bank's failure to remit the proceeds of such warrants when collected, and not merely a relation of debtor and creditor.

2. The District Court erred in ordering and directing the defendant, A. R. Titlow, Receiver, to pay to the plaintiff the sum of \$10,054.69, or any other sum, as a preferred claim, out of the assets of the bank.

3. The District Court erred in rendering a decree allowing a preferred claim to the plaintiff in the sum of \$10,054.69, which decree is contrary to the testimony and against the law, because the equities of the case entitled the defendants to a decree of dismissal.

ARGUMENT.

The right of Mrs. McCormick to receive a preferential payment out of the assets of the insolvent bank to the detriment of the general creditors must be based upon the principle that the proceeds of the collection of her warrants formed a trust fund, and that this trust fund was directly traceable into the assets which passed to the receiver.

It will be recalled that these warrants were purchased by her in August 1913. She returned them to the bank *for collection*. There were no instructions *to collect and remit*. At that time she was dealing with a perfectly solvent bank, and she dealt with the bank according to the custom which prevails among bankers.

In February and April, 1914, the bank collected the warrants. In September, 1914, the bank failed, never having accounted to Mrs. McCormick for the collections so made. As long as the bank held the warrants *uncollected*, the relation between McCormick and the bank was that of principal and agent, but according to banking custom, of which the court will take judicial notice, as *soon as collection was made*, the relation between Mrs. McCormick and the bank

was that of debtor and creditor. It is conceded that there were no *specific instructions* given the bank by Mrs. McCormick. The warrants were sent "for collection." Therefore she *impliedly* consented to deal with the bank according to customary banking methods.

What would be the ordinary, and customary way for the bank to account for the proceeds of this collection? Surely it was never contemplated by either Mrs. McCormick or the bank that when these warrants were called, the banker would go over and secure the actual cash for them, hold it separate and apart, and remit the actual money so collected to Mrs. McCormick. She lived in Tacoma. The bank was in Centralia. The court would have to strain the usual methods pursued between a bank and its customers in order to say that it was contemplated by the parties that the specific money collected for these warrants was to be remitted to Mrs. McCormick. When she deposited them with the bank for collection, *she impliedly consented that when collected*, the bank might remit to her out of a general mass of moneys that it had. This might be by cashier's check or by New York or Tacoma draft. There can be no doubt, that either method of remittance would have been satisfactory to Mrs. McCormick, as long as the bank remained solvent.

The trouble is that none of the parties contemplated that the *bank would fail*. Had the bank continued as a going concern, and had made the collection, could Mrs. McCormick have sued the bank for conversion for not accounting to her for the proceeds of the collection? Or would her action have been one for money had and received? Clearly the latter. Many courts have been thrown into confusion by attempting to trace a trust fund, when *in fact no trust fund existed*.

The discussion of this case is based on

- (a) That there was no trust fund; and
- (b) If there was a trust fund, it has not been established and identified as against the receiver.

NO TRUST FUND.

If it is established in this case that the relation between Mrs. McCormick and the bank was that of debtor and creditor, it is useless to pursue this subject further. If she is a creditor of the bank, she is like any other creditor who has deposited his good money and who in turn expected to receive payment in full. There is nothing in the nature of the case that makes the collection on the warrants any different from any other collection item which may be sent a bank. A person may deposit warrants for

collection, or he may deposit a note, or a check. The same legal principle underlies all collection items. The depositor *impliedly entrusts the proceeds of the collection with the bank*, and consents that after the collection has actually been made, the proceeds may be credited on the books, and a *similar* amount, but not the same amount, remitted.

In *Marine Bank vs. Fulton Bank*, 2 Wallace 252, the instructions were to "please hold the avails of the collection I have sent you subject to my order, and advise the amount credited."

The court recognizes the distinction between the relation of principal and agent and that of debtor and creditor. Mr. Justice Miller says at page 256:

"All deposits made with bankers may be divided into two classes, namely, those in which the bank becomes the bailee of the depositor, the title of the thing deposited remaining with the latter, and that other kind of deposit of money peculiar to banking business, in which the depositor for his own convenience parts with the title to his money and loans it to the banker, and the latter, in consideration of the loan of money and the right to use it for his own profit, agrees to refund the same amount, or any part thereof, on demand. The case before us is not one of the former class. It must be of the latter. The parties seem to have taken this view of it. * * *

But the truth undoubtedly is, as stated in the second branch of the proposition, that both parties understood that *when the money was collected, plaintiff was to have credit with the defendant for the amount of the collection, and that defendant would use the*

money in his own business. Thus the defendant was guilty of no wrong in using the money, because it had become his own. It was used by the bank in the same manner that it used money deposited with it that day by city custom, and the relation between the two banks was the same as that between the Chicago bank and its city depositors."

This case is cited and approved in *Commercial National Bank vs. Armstrong*, 148 U. S. 50, in which Justice Brewer says:

"That reasoning is applicable here. Bearing in mind the custom of banks, it cannot be that the parties understood that collections made by the Fidelity during the intervals between the days of remitting were to be made special deposits, but on the contrary it is clear that they intended that the moneys thus received should pass into the *general funds of the bank* and be used by it as other funds, and that when the day for remitting came, the remittance should be made out of such general funds."

As long as these warrants remained with the bank uncollected, the bank was Mrs. McCormick's bailee. Had the bank during that period misappropriated the warrants, it would have been guilty of a conversion. After the warrants *were collected* and the proceeds turned into the general mass with other deposits, would it have been possible to say that any money embezzled from the bank was the actual proceeds of the McCormick collection? Mrs. McCormick selected the bank as a collecting medium because she considered it the most convenient and

practical way of effecting the collection. Had she desired to insure herself against all loss, she might have sent a special messenger to make the collection and bring her back the gold coin. This, however, she did not see fit to do, but used the ordinary business channels.

In *Freeman's National Bank vs. National Tube Works*, 151 Mass. 413, the court said:

“One who collects commercial paper through the agency of banks must be held impliedly to contract that the business may be done according to their well known usages, so far as to permit the money collected to be mingled with the funds of the collecting bank. *Dorchester Bank vs. New England Bank*, 1 Cush. 177. When a payment is made to his agent and the money is put with money of the collecting bank, he has a right to receive a corresponding sum, but he loses his right to the specific fund.”

Your Honors have said:

“There is no recognized ground upon which equity can pursue a fund and impose upon it the character of a trust, except upon the theory that the money is still the property of the plaintiff. If he is permitted to follow it and recover it, it is because it is his own, whether in the form in which he parted with its possession or in a substituted form.” *Spokane County vs. First National Bank of Spokane*, 68 Fed. 979.

In *First National Bank of Richmond vs. Wilmington*, 77 Fed. 401, C. C. A. 4th Cir., the draft was

sent "for collection." It was again forwarded for collection and remittance. The two banks had no mutual account. That court said:

"In *Armstrong vs. Bank*, 148 U. S. 50, the agreement was that the bank should collect for the plaintiff and remit every ten days, and the United States Supreme Court held that as soon as the paper was collected, the bank became a debtor to the plaintiff for the amount collected. This was equivalent to holding that on collecting the proceeds of drafts, the bank ceased to be an agent and bound to remit the very money collected, but became a debtor for the sum collected. The custom of banks does not require a collecting bank to keep money collected separate from other matters in its possession and to remit that very money to the bank for which it made the collection; and the courts will take judicial cognizance of this fact. If this were not so and if the payor and drawee of a draft were bound to look to the transmission of the very money paid upon it, an important branch of the business of banks would be discontinued, and the sending of money by express would become necessary in all cases of collections, to the great inconvenience of bankers."

In *Philadelphia National Bank vs. Dowd*, 38 Fed. 172, the paper was indorsed "*for collection and immediate return*," and it was sought to impress a trust against the insolvent collecting bank. That court said:

"I have treated this case as one in which the plaintiff is entitled to be considered as a cestui que trust. I think that it is not entitled to be so considered, but ought to be treated as an ordinary creditor, because the money collected, or at least a large

part of it, was allowed to remain for several months with the defendant bank. As I understand the course of business among banks in regard to collections of this kind, it is not expected that the *same moneys that are collected shall be forwarded*. On the contrary, they are uniformly treated as the money of the ordinary depositors, and are remitted by means of the system of exchanges of credit which forms a part of the general mercantile business of the country. The result of giving such collections a preference over ordinary debts of a bank would be to make national banks preferred creditors in every case of insolvency of other national banks."

Now, when a claim to priority is based upon a collection once made, there is no special fund created, according to the universal custom adopted for the mutual convenience of all parties. The collection is commingled with the other deposits of the bank, *unless the banker has received special instructions to preserve the fund and to transmit it in some other method than by check or draft*.

In *Merchants' & Farmers' Bank vs. Austin*, 48 Fed. 25, the court said:

"It is common every day business for banks to employ each other as collecting agencies and they perform this duty in no exceptional way, but in the same manner in which they do the general business of the bank. A bill is collected by the bank and the proceeds commingled with the general assets, so as to be entirely undistinguishable and with no earmarks or means by which it can be traced into any new investment. The bank breaks. Now on what principle does he stand on other or higher ground than he who with

the faith in the solvency of the bank deposits his money and loses it? The contention here is not supported by sound reason or authority. * * * The complainant bank was a victim of this fraud as well as others who had all been alike misled and deceived by the apparent solvency and good credit of the bank. But in a legal or moral point of view, was the fraud any deeper or more flagrant upon the complainant than upon the other creditors of the bank?"

The Circuit Court of Appeals for the 5th Circuit had this question before it in *Annhaeuser Busch Brewing Assn. vs. Clayton*, 56 Fed. 759, in which a draft was sent "for collection and returns."

"There was no contract, express or implied, that the collection from Morris of appellant's account was to be a deposit of any kind, but it is clear that it was intended that the money received from Morris should be remitted in a reasonable time from date of collection. Appellant enclosed its draft on Morris to the McNab Bank for collection and return."

Rule in Washington. The law in the State of Washington is clear that whether the instrument is sent for *collection and remittance* or for *collection only*, the relation of *principal and agent ceases upon collection* and that of *debtor and creditor arises after the collection has once been made*, and that in case of failure of the collecting bank, the party sending the collection is a general creditor.

Hallam vs. Tillinghast, 19 Wash. 20. A draft was sent "for collection."

“There is no contention that there was any agreement that the particular money should be preserved in specie. In fact, it must be presumed, under the custom stated, that the particular money paid to satisfy the draft was never received by the bank here, as following the custom the draft would be sent by the bank to its correspondent where the draft was payable, for collection. When paid, under such custom the specie would not be remitted, but the bank sending the draft would be credited with the amount merely, and such matter left for future settlement in the balancing of accounts. The respondent was bound to know this custom. The fact that he never specially agreed to deposit the proceeds of the draft with the bank made no difference. *If he wanted to except it from the general custom, there should have been an agreement that the specific money should be set aside for him or disposed of in some particular way, or at least that upon the payment of the draft a like amount should be segregated from the general funds of the bank and kept for him, thus keeping the proceeds in a specially substituted form.* Had this been done prior to the insolvency of the bank, no doubt a trust would have resulted as against the receiver, *if the particular proceeds in either the original or substituted form came in his possession.* There is no equity in a rule giving such claims as the plaintiff’s a preference over general creditors. He trusted the bank under the general custom and deposited the draft for collection *the same as any other general creditor trusted the bank.*”

It must be conceded that there are authorities to the contrary, but it is submitted that the well reasoned cases recognize the distinction between the relation of the parties as long as the item is uncollected, and the relation that arises upon the collection’s being made.

Federal Court will follow the State law. This transaction occurred in the State of Washington, and in her dealings with the bank Mrs. McCormick is bound by the decisions of the State court. Mrs. McCormick lived in Tacoma, the bank was in Centralia and the collection made in Chehalis. All parties were dealing in the State of Washington.

In *Kent vs. Dawson Bank*, Fed. Cases 7714, 13 Blatchf. 237, a draft was drawn on a person in North Carolina. It was owned by a Chicago bank and transmitted by mail to the defendant in North Carolina with instructions to collect and remit the returns. The draft was collected through the B. & G. Bank. The collecting bank, after making the collection, failed before remitting the amount.

“The place of performance of a contract is generally a controlling consideration by which to determine the *lex loci contractus*, and where, as here, the contract was both made in North Carolina and was to be performed there, it is clear that the case must be controlled by the law of that State. It is not claimed that any statute exists in the State of North Carolina which affects the rights of the parties, or that the courts of that State have passed upon the direct question here, but the testimony of experts, lawyers of that State, has been produced, by which it appears that the question is yet an open one, to be determined by the general principles of commercial law, as recognized by that State in common with the other States of the Union.”

FAILURE OF MRS. McCORMICK TO TRACE ANY TRUST FUND INTO THE POSSESSION OF THE RECEIVER.

It is the settled doctrine of modern equity jurisprudence that a trust fund will be followed so long as it can be identified and traced either into property or into a larger fund held by a receiver. If the receiver has in his possession a fund which belongs to the claimant, it should be returned. It is immaterial whether the trust fund arose from a breach of contract for holding a special deposit or from a deliberate fraud. The early equity rule was that money could not be traced at all after it had been mingled with other funds of the trustee.

Ex parte Dale & Co., L. R. 11 Ch. Div. 772.

This rule has been modified by modern decisions. But in applying the modern rule, three principles must not be overlooked.

1. That *general creditors* cannot be held to atone for the omissions of a trustee. They are not to be punished for his wrongdoing. If the money has been taken and squandered, the *cestui que trust* becomes a general creditor and shares with the others, under all insolvent laws providing for the ratable distribution of assets.

2. Creditors who would otherwise be general ones, should not be allowed to profit by a breach of trust or fraud of the trustee.

3. One seeking to establish a trust fund must do so by clear and convincing proof. The burden of establishing and tracing his res, either in the original or in a substituted form, rests at all times upon the claimant.

If a national bank fails having \$30,000 in cash, and it appears that within three months prior to its failure some \$130,000.00 in actual cash had been deposited by general creditors over the counters of the bank, would it be possible for the court to say, in the absence of any specific proof, that a claimant to a fund of \$15,000, which was obtained by the bank some *eight months prior*, could trace his money into the \$30,000.00 remaining at date of failure? Is it not more likely that the \$30,000.00 fund was received from the *later depositors*?

Coffman, Dobson & Co. account. Let us now apply these principles to the case at bar. When the warrants were paid, the bank received no *actual cash*. The county treasurer's check of February 4 on Coffman, Dobson represented approximately \$1500 of the collection. This with other items was sent by the bank to Coffman, Dobson on February 6th, at which time Coffman, Dobson owned the U. S. National, including this item, about \$5000. Of this, \$1500 belonged to Mrs. McCormick.

What became of this credit with Coffman, Dobson? It was entirely exhausted on February 14. It is clear, under all the authorities, that no replenishment of the credit with Coffman, Dobson would *re-establish* any claim to a trust fund. *Our inquiry is therefore confined to the state of the Coffman, Dobson account between the date of remittance, to-wit, February 6th, and the date that the account was overdrawn on February 14.* The testimony shows that this credit was exhausted by Coffman-Dobson cashing checks which were drawn on the U. S. National by the latter's depositors. In other words, Coffman, Dobson paid certain debts of the U. S. National. These checks were of course transmitted to the U. S. National and charged to its various depositors' accounts and the checks returned. No part of this credit was transmitted to any reserve agents of the U. S. National (64). Both Coffman, Dobson and the U. S. National were *paying out money on each other's account. Neither was receiving any money on the other's account.* This credit account with Coffman, Dobson was utilized in the *ordinary course of business by the U. S. National in paying its debts and obligations to others. There is a total lack of proof that any part of this credit was traced either:*

(a) *Into the U. S. National bank vaults;*

(b) *Into anything of value which passed to the receiver.*

(c) *By transfer to any other bank through which the receiver ultimately received either money or any other item.*

Bank of California account. Practically the same facts existed as to the checks which were received in exchange for the warrants, and which checks were sent to the Bank of California in Tacoma. Here again it is apparent that *no cash* went into the vaults of the U. S. National. The two checks which went to the Bank of California, aggregating \$8974.08, were included in a remittance of \$19,198.02, but after applying this remittance of over \$19,000.00, the Bank of California, *according to its own books*, was indebted to the U. S. National only to the extent of \$3642.20. *In other words, \$5331.88 of the two McCormick checks was therefore applied in extinguishing a debt at that very time* which the U. S. National owed the Bank of California, and in this respect the transaction with the Bank of California is similar to the transaction with the Security State Bank, in which instance the trial court held Mrs. McCormick not entitled to a preferential claim because the check that went to *that bank* simply diminished the overdraft that the U. S. National had with it. In principle, what difference can it make whether the *overdraft is di-*

minished or entirely eradicated and a small credit balance established? Surely the claimant would lose his right to follow any trust fund beyond the *remaining balance*.

But let us go further. If we take the books of the U. S. National Bank, we find that after this remittance, the U. S. National had a credit balance with the Bank of California on April 15 of some \$11,000., the credit balance remaining and fluctuating from day to day *until an overdraft occurred on April 28*. The discrepancy between the books of the two banks arises in the ordinary course of business in the following way: The U. S. National was like any other depositor in the Bank of California. The *depository's* books would show the *actual* condition of the account, the *depositor's* books showing outstanding items which *had not been actually credited or actually charged*. There is nothing mysterious about the deposit of one bank in another. The relation between the two banks is simply that of depositor and creditor, just the same as any customer of a bank. It is simply a question of balances, debits, and credits. (Testimony of Ralph S. Stacey for plaintiff, 50.)

What became of the balance that the U. S. National had with the Bank of California between April 15 and April 28, when the overdraft occurred? It

affirmatively appears that a substantial amount of this credit went to the depositors of the U. S. National (63). As to the remainder of the fund, the record, so far as it speaks at all upon the subject, shows that it was expended in the payment of other debts of the bank. None of this balance was transferred to other reserve agents of the U. S. National (65), and there is no showing that any portion of this *credit found its way into the vaults of the U. S. National*. The fact that the California bank was a reserve agent of the U. S. Bank is immaterial. Mr. Stacey's testimony shows that the relation between these banks under such circumstances is purely that of debtor and creditor. The reserve bank does not hold the funds sacredly set aside from the balance of its assets, but it is simply a debtor to any amount of the reserve credit shown on its books. As expressed in § 5192 of the Revised Statutes, it is merely "*a balance due*" from one association to another. Precisely the same principles apply as would obtain in case a trust fund had been traced into the hands of a private individual.

Mrs. McCormick then is driven to inferences and conjectures in order to establish her right to preference. She says: "The proceeds of my warrants went in the form of a credit to some of your correspondent banks. *It will be presumed* that this found its way back into your vaults and into the hands of

the receiver.” Such a doctrine is antagonistic to practically all the decided cases on this subject. As said in *Beard vs. Independent District of Pella City*, 88 Fed. 375, p. 381:

“Why should fiction be resorted to in order to sustain a preference on behalf of the school district to payment out of a fund not augmented in fact by any sum belonging to the district?”

Burden of Proof of Plaintiff.

Not only has the claimant in this case failed to establish by proof that the fund that she claims came into the possession of the receiver, but the record conclusively proves the contrary. Counsel point to the fact that at various dates the U. S. National had more than enough cash in its vaults to pay the complainant's claim. That might be material *if it were shown that the claimant's fund had been traced into the vaults of the bank*. The fact is that credit was traced into two depository banks and there dissipated. The defendant receiver has gone further in this case in the matter of proof than is necessary by showing that the proceeds of these credits were dissipated. The claimant is driven to the position of asserting a charge upon *all the assets of the insolvent bank*, a doctrine which is repudiated by all the authorities.

In the *City of Litchfield vs. Ballou*, 114 U. S. 190, the court said:

“If the complainants go after the money they let the city have, they must *clearly identify* the money or the fund or other property which represents that money in such a manner that it can be reclaimed and delivered without taking other property with it, or injuring other persons, or interfering with others’ rights.”

In this connection we call the court’s attention to *Schuyler vs. Littlefield*, 232 U. S. 710, to which case we will have occasion to refer in detail in another portion of this brief.

Your Honors applied this doctrine in *In re Acheson Co.* 170 Fed. 427, in which case the claimant attempted to establish a trust fund against a bankrupt’s estate:

“But it is a general rule, as well in a court of equity as in a court of law, that in order to follow trust funds and subject them to the operation of the trust, they must be identified. (Citing authorities.) In carrying out the rule, when it comes to *proof*, *the owner must assume the burden of ascertaining and tracing the trust funds*, showing that the assets which have come into the hands of the trustee have been directly added to or benefited by an amount of money realized from the sales of the specified goods held in trust, and recovery is limited to the extent of this increase or benefit. * * * So funds that have been dissipated or that have been used to pay other creditors, or that have been spent to pay current business expenses, are not recoverable, because they are gone and there is nothing remaining to be the subject of the trust.”

In *Empire State Surety Co. vs. Carroll County*,
194 Fed. 593, C. C. A. 8th Cir.:

“It is indispensable to the maintenance by a cestui que trust of a claim to preferential payment by a receiver out of the proceeds of an estate of an insolvent, that *clear proof* be made that the trust property or its proceeds went into a specific fund, or into a specific, identified piece of property, which came into the hands of the receiver, and then the claim can be sustained to that fund or property only, and only to the extent that the trust property or its proceeds went into it. *It is not sufficient proof* that the trust property or its proceeds went into the *general assets* of the insolvent estate and increased the amount and value thereof which came into the hands of the receiver.”

Claimant has not traced any trust fund into the hands of receiver.

With the burden resting upon Mrs. McCormick to trace and identify the proceeds of her collection either in the original form or in some substituted form, it is not sufficient that the claimant show a mere augmentation or swelling of assets, nor is she entitled to a lien against the *general assets* of the receiver. It is her duty to trace, by clear and satisfactory proof, the trust res in the receiver's possession. Some of the earlier cases, including those from this circuit, fell into error in this respect, as we will show later.

This general rule is stated in *Peters vs. Bain*, 133 U. S. 670, which was a suit to recover misap-

propriated trust funds. Bain & Company, a copartnership in control of the Exchange National Bank, had appropriated practically all the assets to their own purposes. That was a suit by the receiver of the bank to impress a trust on the assets of the partnership, which had assigned for the benefit of creditors. The property which was sought to be recovered fell into two classes, the first relating to property which was purchased with moneys that could be *identified* as belonging to the bank, and second, that which was bought and paid for by the firm out of a *general mass* of moneys in their possession, and which *may* or may not have been made up in part of what had been wrongfully taken from the bank. The trust was held established as to the first property, which was directly traceable to the assets of the bank. As to the second class the court said:

“Some of the money of the bank *may have gone into this fund*, but it was not distinguished from the rest. The mixture of the money of the bank with the money of the firm did not make the bank the owner of the whole. All the bank could in any event claim would be the right to draw out of the general mass of money, so long as it remained money, an amount equal to that which had been wrongfully taken from its own possession and put there. Purchases made and paid for out of a general mass cannot be claimed by the bank, *unless it is shown that its own moneys then in the fund were appropriated for that purpose.*”

In *Empire State Surety Co. vs. Carroll County*, 194 Fed. 593, C. C. A. 8th Cir., Judge Sanborn states four rules governing this class of cases:

“1. The claimant must prove clearly that the trust property or its proceeds went into a specific fund or specific property, which came into the hands of the receiver. It is not sufficient to prove that the trust property or the proceeds went into the general assets and increased the amount coming to the receiver.

“2. If trust funds are mingled in a common fund, and payment is made out of that fund, claimant can recover not exceeding the smallest amount the fund contained subsequent to the commingling, since the presumption is that the trustees kept the trust fund sacred.

“3. For this reason the legal presumption is that promissory notes and other paper coming into the hands of the receiver were not procured by the use of trust property.

“4. Where the property of many cestuis que trustent is mingled, and payment made out of the common fund, the presumption is that the moneys were paid out in the order they were paid in, and cestuis que trustent are entitled to preference in the inverse order of their payments into the fund. First in, first out.”

That case involved various claims founded upon different facts. Judge Sanborn said:

“They next claim that they are entitled to preferential payment of about \$12,000.00, first, because \$4,455.05 was owing on the notes discounted by the bank between June 11, 1908, and October 17,

1908, which came to the hands of the receiver, but the claim to such an allowance on account of these notes is forbidden by the third rule and by the fact that there is no evidence tracing any of the county deposits or any of the proceeds of them into any of these funds; second, because the receiver collected \$1,763.77 from credits to the *First National Bank in other banks*, but no preference on this account may be allowed for the same reason; and third, because \$5,912.05 in cash came into the hands of the receiver when the bank failed, but the allowance of a preference on this account is forbidden by the fourth rule, and by these facts: All of the deposits of the county were made prior to October 10, 1908, except a deposit made on that day of tax receipts aggregating \$1,041.22, and checks of third persons aggregating \$486.11, and a deposit made on October 17, 1908 of \$1,604.88 in checks. It was for these two deposits that the preference of \$3,132.21 was allowed to the sureties by the court below. But this record has been searched in vain for any evidence that the checks for the \$1,604.88 deposited on the last day the bank was open ever went into the hands of the receiver, and no claim is made to recover these checks, nor can any evidence be found sufficient to show what banks these checks were drawn upon, or that any moneys derived from them ever went into the \$5,912.05 or into the hands of the receiver. Proof that these checks augmented the cash that went into the hands of the receiver, or that they produced cash which he obtained, was indispensable to any preference on their account. But checks of third persons on the bank with which they are deposited, which are paid by crediting the bank and charging the drawers on the books, fail to increase the cash in its possession, and form no basis for preferential payment to the depositor. *Beard vs. Independent District of Pella City*, 88 Fed. 375. Moreover, the deposit of checks of third persons which are credited to the depositor and used by the bank to pay its debts, bring

no money into its fund of cash, and form no foundation for preferential payment to the depositor. *City Bank vs. Blackmore*, 75 Fed. 771. Again checks of third parties, deposited with the bank credited to the depositor, and collected through a clearing house, lay no foundation for a preferential payment, in the absence of proof of the of them, for they may have been and usually are used, in whole or in part, to discharge the debts of the bank (citing authorities.) These checks may have been, and the probability is much greater than most of them were, used for some of these purposes than it is that cash for them was paid into the bank and remained there at the close of the day and went into the hands of the receiver."

An analogous case to the one at bar was that of *American Can Co. vs. Williams*, C. C. A., 2d Cir. 178 Fed. 420. Preference was claimed against the receiver of an insolvent bank on the following grounds: Plaintiff forwarded to the Fredonia Bank for collection certain drafts on two local corporations, aggregating some \$28,000. The bank collected the drafts in the following manner: First, drafts paid by the drawees' check on outside banks, made payable to the Fredonia bank, and subsequently *paid directly to defendant as receiver*. Second, drafts paid by the drawees' checks on outside banks, made payable to the Fredonia bank, and paid by the former to the latter *before* the appointment of a receiver. Third, drafts paid by the drawees out of their accounts as depositors of the Fredonia bank. *Fourth*,

drafts paid by the drawees' checks on outside banks made payable to the Fredonia bank, and indorsed and delivered by it to the Merchants Exchange National Bank of New York City, and credited by such bank to the Fredonia bank.

Your Honors will perceive that the fourth state of facts is identical with those at bar.

It was further *conceded* in the case that

“At all times mentioned in the complaint prior to the 20th day of June, 1905, the assets of the Fredonia Bank and the assets which came into the defendant's hands as receiver and which are now in his hands, exceeded the amount of the plaintiff's claim.”

The court assumed that the proceeds of certain of these drafts did come into the possession of the bank *before* the receivership *and constituted trust funds* in its hands, but the court says:

“The difficulty is, upon the agreed statement of facts, in following such funds into the hands of the receiver. *It may be* that prior to the receivership the bank used the trust fund to pay its debts with. It may be that these funds were wholly dissipated. *There is absolutely nothing to show that they had any connection with any of the property which came into the possession of the receiver.* The stipulated facts are wholly insufficient to show *any identity* of the property followed with the funds sought to be charged against it, or to show that the amount of

such property was increased or augmented by such funds. While the right to follow misapplied moneys as trust funds into the hands of a receiver has been extended in the modern decisions, there has never been in the federal courts a departure from the principle that there must be some identification of the property followed with the trust funds. * * * If the plaintiff's contention is well founded, that to follow misappropriated moneys it is only necessary to show that a receiver has, and that the trustee had, assets, the rule is simply that a demand for such moneys is a preferred claim against any substantial estate, and to adopt this view would do away with all the equitable principles out of which the right to follow trust funds grew."

In *City Bank vs. Blackmore*, 75 Fed. 771, C. C. A. 6th Cir., it appeared that the plaintiff City Bank sent a draft on August 24, to the Commercial National Bank of Nashville. The draft was drawn on Latham & Co., of New York, and was for \$5,000.00. The Commercial Bank, then insolvent, received the draft August 25, credited the City Bank, and immediately sent the draft to the Bank of the Republic, its New York correspondent, to be deposited to the Commercial Bank's credit. Later in the day, August 25, the Commercial Bank was closed. The New York bank credited the draft to the Commercial Bank August 27. The City Bank stopped payment on the draft August 26. Accordingly the drawee refused to pay, but later, by direction of the City Bank, paid when the New York Bank brought suit

against the City Bank on the draft. The City Bank then presented a claim to the receiver and asked that \$5,000 be allowed as preferred. Judge Taft, in holding the City Bank not entitled to priority, said:

“But the difficulty with the complainant’s position is that neither the draft nor the proceeds of the draft have come into the receiver’s hands. The sole question is therefore whether the *credit* thus secured by the Commercial Bank and its receiver by the draft entitles the City Bank to take \$5,000 out of the assets held by the receiver. The question must certainly be answered in the negative in any view which can be taken, unless it appears that the assets were increased \$5,000 by the credit, or that the claims against them were so decreased that there was \$5,000 *more for distribution* among those who remained creditors after the credit than there would have been had no credit been given to the Commercial Bank for the draft. This does not appear. If no such credit had been allowed by the National Bank of the Republic, it would merely have been a claimant for \$5,000 more and would have been entitled, not to \$5,000 in full, but only to pro rata dividends on that amount. The benefit to the general fund from the draft, therefore, is limited to the amount of dividends payable on the \$5,000.00, and that amount the receiver has already allowed to the City Bank. It has no ground for complaint, therefore. No authority has been cited to show that a claim founded on fraud is entitled to *priority* over other claims. It is only where, by rescission of the contract out of which the claim arises on the ground of fraud, that the specific thing parted with or its proceeds can be sufficiently identified to be returned, that fraud seems to give a priority of distribution.”

The opinion was concurred in by Mr. Justice Lurton.

By depositing a check with a correspondent bank, in the nature of things, does it make any difference whether the *debt to the correspondent bank* is reduced, or whether the credit with the correspondent bank is used to *pay other creditors*? In both instances the fund is lost. There is no greater amount for distribution among the general creditors. Instead of making A a creditor of the bank, B is made a creditor, and the substitution of parties is the only thing accomplished by the paper transaction. This question of tracing trust funds against an insolvent was recently before the Supreme Court in *Schuyler vs. Littlefield*, 232 U. S. 710. The same case in the lower court, *In re Brown*, 193 Fed. 24. In the Circuit Court of Appeals the facts appeared as follows:

The bankrupts, Brown & Co., had converted certain stock belonging to the Princeton Bank. From the proceeds of the stock, Brown & Co. deposited \$1,120 in the Bank of Commerce and \$280 in the Hanover Bank. These transactions were on August 17 and August 24. The bankruptcy occurred at noon, August 25. The bankrupts also sold other stock of the Princeton Bank, and on August 13 had deposited the proceeds, \$1,787, in the Hanover bank. As to Brown & Co.'s deposits in the Bank of Commerce, it showed that there was a balance in favor of the bankrupts from August

17 to 24 largely in excess of \$1,120. The balance August 25 was \$21,000 but this was exhausted by checks subsequently presented. and the trustee received no money from that account. It further appeared that on August 25, though Brown & Co. had transferred \$4,000 from the Bank of Commerce to the Hanover Bank by check, there was nothing to show that the \$1,120 trust funds were included in this check and reappeared in the balance of \$2,000, *which balance the trustee in bankruptcy received from the Hanover bank.* As to the deposit in the Hanover bank, the claim of the Princeton bank against this fund aggregated \$280, plus \$1,787, making a total of \$2,067. The balance on the books of the Hanover Bank in favor of the bankrupts on and after August 13 to August 24 *were largely in excess* of the sums due the Princeton bank. It was held, however, that a trust fund was not established, that there was nothing to show that these balances represented the trust money of the Princeton bank rather than the trust money of various other persons urging similar claims aggregating \$21,000. There was also nothing to show but that during the same day the balance had been entirely wiped out and the trust fund lost, and subsequent deposits would not make it good.

Your Honors will see the amazing similarity of the facts in the *Brown* case to those in the case

at bar. *First.* The insolvent was dealing with two correspondent banks, in which correspondent banks the trustee had deposited the funds in dispute. *Second.* The alleged trust fund was represented by mere credit balances due the insolvent. The *Brown* case contains these *additional* facts, which were *favorable* to the claimant. *First.* The fund of \$4,000 had been transferred from one of the depositories to the other. *Second.* The trustee of the insolvent actually received in cash over \$2,000 *after insolvency* from the second depository. As to the insolvent's account with the Bank of Commerce, that court said:

“If \$1,120 of the claimant's money was left in that bank, it has been dissipated and can be traced no further.”

The claimant then asserted that by the transfer of the \$4,000 from the Commerce bank to the Hanover bank, his trust fund was thereupon transferred to the Hanover bank, and that the trustees in bankruptcy admittedly received in cash the sum of \$2,055.97, this cash receipt included the claimant's \$1,120. That court said:

“This seems a very tenuous presumption *in the absence of any evidence to support it.* The amounts are different. There is nothing to show that there was a sum of \$2,880 trust money of some sort with which the claimant's \$1,220 was being shifted by the bankrupts, for some unexplained reason, from one bank to another. As we said in *In re McIntyre*, Grace's appeal, 185 Fed. 96, 108 C. C. A. 540, while

the doctrine of following trust funds has been much extended in modern decisions, there has never been a departure in the Federal courts from the principle that there must be some identification of the property sought to be charged with the trust fund. * * * The special master finds that 'The opening and closing balances in the Hanover bank on and after August 13, were largely in excess of these (2 deposits), *but the finding is not sufficient.* There is no reason why it should be *assumed* that these balances were being reserved because they represented the trust money of the Princeton bank rather than because they represented the trust money of Simpson or Scrotton or any of the others similarly situated, enumerated above (aggregating \$21,783.39), or indeed any of the other claimants who from time to time have appeared in this proceeding seeking to trace and recover for property converted by the bankrupt. Moreover, it is not enough to show that there was a morning and afternoon balance for several successive days large enough to cover that amount of money which was improperly converted. It might very well be that on any one day checks were presented which exhausted the morning balance and its accretions, in which event these moneys would have been dissipated. We are not prepared to assent to the proposition that subsequent deposits are to be taken as having been made to make good claimant's money thus drawn and spent. *Board of Commissioners vs. Strawn*, 157 Fed. 51."

This case was affirmed in the Supreme Court in *First National Bank of Princeton vs. Littlefield*, 226 U. S. 110. The same case was also before the Supreme Court of the United States as to another claimant *sub nom Schuyler vs. Littlefield*, 232 U. S. 710. In affirming the Circuit Court of Appeals, the Supreme court said:

“Money was paid by Brown & Co. to outsiders and to the bank. It would serve no useful purpose to make a detailed statement of the testimony. The evidence has been fully discussed by the court of appeals in considering this claim of the appellants, along with that of several other parties seeking, on somewhat similar facts, to trace trust funds into the bank, and thence into collaterals which ultimately came into the hands of the trustee. All these claims were disallowed because of the failure to make the requisite proof. Our investigation of the facts leads us to the same conclusion, as far as concerns the appellants’ claim. They were practically asserting title to \$9,600 said to have been traced into stock in the possession of the trustee. Like all other persons similarly situated, they were under the burden of proving their title. If they were unable to carry the burden of identifying the fund as representing the proceeds of their Interborough stock, their claim must fail. If their evidence left the matter of identification in doubt, the doubt must be resolved in favor of the trustee, who represented all of the creditors of Brown & Co., some of whom appear to have suffered in the same way. Like them, the appellants must be remitted to the general fund.”

With the foregoing review of the decisions of the other circuits and the Supreme Court of the United States, let us now turn our attention to this circuit. We have already called the court’s attention to the last decision of your Honors on this point in *In re Acheson*, 170 Fed. 427, in which case a preference claim was asserted by the petitioner for the proceeds of goods sent to the bankrupt on consignment. The petitioner alleged in that case that the trust fund was not kept separate and apart, but wrongfully mixed

with the other money of the bankrupt, and that it had been used in payment of the bankrupt's employees and other running expenses, and paying other creditors and in purchasing other goods, wares and merchandise, which composed the assets of the bankrupt. The question was whether this made a *prima facie* showing of a charge upon the funds in the trustee's hands in favor of the owners of the goods, and if so, to what extent did it reach?

"We do not mean to be understood as holding that equity will grant to a cestui que trust relief against any assets in the hands of a trustee, *for it will not go farther than to give a lien when the facts are that there remain in the estate specific funds or property which have increased the assets of the estate and which represent the proceeds of the specific property entrusted to the bankrupt.* So funds that have been dissipated or that have been used to pay other creditors, or that have been spent to pay current business expenses are not recoverable, because they are gone, and there is nothnig remaining to be the subject of the trust. This qualification of a general rule is to be applied to the facts pleaded in the present case, inasmuch as it is alleged that some of the trust moneys were used by the bankrupt in paying its employees and expenses of running its business and in paying other creditors. For them there can be no recovery."

In that case your honors cited with approval the earlier case of *City of Spokane vs. First National Bank*, 68 Fed. 982, and also other cases heretofore mentioned in this brief. In addition, your Honors relied upon the leading case of *Lowe vs. Jones*, 192

Mass. 94, 6 L. R. A., N. S. 487. In the *Acheson* case, this court adopted the universal holding of the other circuit courts of appeal, repudiating some of the earlier holdings in this circuit.

One of these early cases was *San Diego County vs. California National Bank*, 52 Fed. 59, where a trust was decreed against the general assets of the estate, without attempt to trace the fund.

In the subsequent case of *Multnomah County vs. Oregon National Bank*, 61 Fed. 912, the court expressly refused to follow the *San Diego* case. It was criticised in *In re Marsh*, 116 Fed. 396, and by Judge Lowell in *In re Mulligan*, 116 Fed. 715. Judge Gilbert in the *Spokane County* case, in 68 Fed. 979, 982, said that this case, among others, laid down a doctrine to which the court could not assent. It was followed by the lower court in the *Beard* case, 83 Fed. 14, which was reversed by the Circuit Court of Appeals in 88 Fed. 375. Judge Sanborn, in the *Carroll County case*, 194 Fed. 604, says that the doctrine of that case and some others is sustained "neither by reason nor authority."

Your Honors' decision in *Spokane County vs. First National Bank of Spokane*, 68 Fed. 979, is a leading case in this country on the right of a claimant to assert and follow an alleged trust fund. It has been

cited and its language quoted many times by other circuit court of appeals with approval. It has stood as a solid rock against all attacks. A circuit court in Ohio attempted to explain it: *Board of Commissioners vs. Patterson*, 149 Fed. 229, but the decision of the lower court was promptly reversed by the circuit court of appeals in the 6th circuit in *Board of Commissioners vs. Strawn*, 157 Fed. 49.

A case upon which Mrs. McCormick will rely is *Merchants' National Bank of Helena vs. School District*, 94 Fed. 705. In that case there was admittedly a trust fund, and the only question was whether it had been traced into the hands of the receiver. The claimant was dealing with a Helena bank, and his fund consisting of a collection item of \$13,000 had been deposited to the credit of the Helena Bank with the National City Bank of Boston, which was the correspondent of the Helena bank. After this credit with the Boston bank, the Helena bank had a credit balance with that bank of over \$39,000, *against which it drew on that day* the sum of \$10,000, leaving a balance of some \$29,000. A few days later a *draft* was drawn by the Helena Bank against the Boston bank of \$8,000. Your honors said:

“The question is not complicated by any failure on the part of the Boston bank to pay to the Helena bank in full the amount which it received. *The Helena bank received the money in the due course of business.*”

In that case the actual money found its way into the Helena bank. If your Honors' decision in the Helena bank case means that the mere obtaining of a *credit* by the Helena bank with the correspondent bank is the receipt of the money, by the Helena Bank, we submit that the case can not be sustained on principle and is opposed to the overwhelming weight of authority. Suppose the Helena bank had been overdrawn at the Boston bank and the credit had been used to diminish the overdraft. Clearly the trust fund would be lost.

Now let us suppose that after the credit of the amount of the trust fund is obtained with the Boston bank, the Helena bank draws a draft on Boston *not to transfer the credit to its own vaults, but to pay a debt that the Helena bank owes A or another bank.* Is there any reason for saying, in such an instance, that the trust fund has not been dissipated, or that the assets in the hands of the receiver have been swollen and augmented. This would be directly contrary to your Honors' previous ruling in the *Spokane County* case. The Helena bank case has never been cited as sustaining any such principle, that is, that a credit with the correspondent bank for a trust fund is receipt by the bank itself, except in one case, which was on a *preliminary* hearing, *City of Centralia vs. Titlow, Receiver*, heard by the same trial judge as

this case. The *City of Centralia* case is now on appeal to this court. *City of Centralia vs. U. S. National Bank*, 221 Fed. 755.

Mrs. McCormick will say that "the receipt by the *agent* is a receipt by the principal. As soon as we trace this item into a correspondent bank we trace it into your actual possession." She will say that your Honors have so held in the Helena bank case. This overlooks the qualifications of the general rules of law applicable to of principal and agent as applied to a bank and its depositors. In a sense a bank is the agent of each of its depositors. It is also their debtor.

Counsel will be unable to cite to your Honors any case where a trust fund is sought to be followed that applies the principle of agency to a correspondent bank and which holds a *credit* with the correspondent bank is receipt of the fund by the bank itself. Such a doctrine would be antagonistic to all banking principles and interests. A bank in a large city is the correspondent and reserve agent of many other banks. It breaks. Is every bank that has a deposit in the city bank entitled to preferential payment of its claim as opposed to *all other depositors* in the bank? The depositing bank is in the same position as any other depositor, individual or otherwise.

In the Helena bank case, suppose it had been the Boston bank that had failed, owing the Helena bank more than the \$13,000 deposited by the school district. Would the Helena bank have had a right to a preferential payment as against the Boston bank for the amount of the Helena bank's deposit?

We have called attention to the Helena bank case for the reason that the lower court gave it the strain-of this court in the Spokane County case, and the subsequent decisions by the same court, and with the overwhelming weight of authority elsewhere, than the narrow construction attempted to be placed upon the case by the appellee and the trial court.

It is preferable to give it that construction which renders that case consistent with the prior decision case consistent with the prior decision of this court in the Spokane County case, and the subsequent decisions by the same court, and with the overwhelming weight of authority elsewhere, than the strained construction attempted to be placed upon the case by the appellee and the trial court.

Banking business is done by means of debits and credits. If the insolvent bank, through the misappropriation of a trust fund, obtains a credit with the correspondent bank, and that credit is returned in money to the insolvent bank or goes to purchase notes or other securities which pass into the hands

of the receiver, the trust fund is traced, but if the credit balance with the correspondent bank is exhausted or utilized in the ordinary course of business by the insolvent bank, if it pays creditors of the insolvent bank, running expenses, or other charges against it, the fund is lost. There can be no *presumption* that the receipt by the correspondent bank carries the fund into the vaults of the insolvent bank and to its receiver, for, as we have seen, the burden of *actually tracing* the fund is upon the claimant.

In addition to the cases heretofore cited, we call the court's attention to the following authorities bearing on this subject and the right to trace funds. Many of these cases involve credits obtained with correspondent banks and reserve agents, and hold that the receipt of a credit with a correspondent bank is not a receipt by the bank itself when it comes to asserting a preferential claim.

Lucas County vs. Jamison, 170 Fed. 338;

In re See, 209 Fed. 172, C. C. A. 2d Cir.

In re Brown, 193 Fed. 24, C. C. A., 2d Cir. Affirmed *sub nom* Schuyler vs. Littlefield, 232 U. S. 710.

Cherry vs. Territory, 89 Pac. 190 (Okla.)

In re Dorr, 196 Fed. 292.

Rule of first in first out. It appeared that there were five other pending suits against this bank and its receiver asserting preferential claims as follows:

City of Centralia for \$44,553.09, which was deposited in July 1914.

Continental & Commercial National Bank, for \$5166.67, covering a collection in August 1914.

Frank P. McKinney, as receiver, for \$36,550.00, for preferential claim covering a transaction in August 1914.

Nicholas Petrinovich, covering a deposit of \$150.00 on September 15, 1914.

John P. Sundquist, covering a deposit of \$1,296.00 on August 31, 1914. (54-56)

So that in addition to the suit at bar, there were pending at the time of trial of this case other suits involving over \$80,000 of alleged preferential claims against this bank. All of the other claims covered transactions subsequent to May 1914. It will be recalled that Mrs. McCormick deposited her warrants in 1913. They were *collected* in February and April 1914. Mrs. McCormick's claim is therefore the first in order of time. When the bank closed there was actual cash on hand of \$27,899.81 (53). From July 29 till the date that the bank closed there was some \$129,000 in actual money deposits which passed over the counter of the bank. Again we are thrown into the realm of mere speculation as to whom the cash on hand at the date of insolvency belonged to. Did it

belong to the \$129,000 of general depositors, subject to ratable distribution among them, or did it belong to Mrs. McCormick, who alleges a breach of trust on the part of the bank not later than April 1914, or does it belong to the City of Centralia, by reason of its transaction in July, 1914? The rule is that when the property of many beneficiaries is commingled and payment is made out of this fund, there is a presumption that the moneys that were paid out were paid out in the order in which they were paid in, so that the beneficiaries are entitled to preference in the *inverse* order of thier payments into the common fund. As said in *Empire State Surety Co. vs. Carroll County*, 194 Fed. 593 at p. 607:

“All these deposits were trust funds, and applying the rule that deposits of equal trust rank are presumed to be drawn out in the order that they were paid in, and that allowable preferences in the remaining balance must be given in inverse order of their payment to the trustee, all of the deposits of the 10th of October had been drawn out long before October 17, 1908, and the \$5912.05 was the property of the *later depositors*.”

In *Lucas County vs. Jamison*, 170 Fed, 338, the court said:

“But the court knows that there is still another on its docket in which a preference of more than \$100,000 is asked; so it will be seen that if preferences could be allowed in these cases, then the other cases involving so large an amount might cover the same funds.”

In *Cherry vs. Territory*, 89 Pac. 190 (Okla.) which is in other respects pertinent, the court said:

“But when the evidence in the particular case shows affirmatively that a party stands in the same position as others, as for instance in a receivership matter, and the court is passing upon the priority of claims, it should consider the effect of the particular judgment upon the other creditors similarly situated.”

While there is a showing that there was a certain balance due from correspondent banks when the bank failed, still these amounts are not segregated, and the whole balance, as far as this claim is concerned, might be owing from the Bank of California. Surely any balance that was owing from that bank could not be taken into consideration, because the right to follow the *credit* in the Bank of California ceased when the overdraft occurred with that bank on April 28, 1914. The whole amount due from correspondents might be from Coffman-Dobson, but for a like reason *that account* could not be counted, because an overdraft occurred with Coffman, Dobson & Co. on February 14, 1914, and any credits in that account subsequently, as has been shown, would not replenish the fund. From all that appears, sums due from other correspondents may be subject to offsets and counterclaims.

Form of Decree. This decree fails to take into account any of the other pending suits for preference.

Judgment is given against the receiver Titlow for \$10,054.69, and he is directed to pay that out of the moneys in his hands. This form of decree is objectionable first as being a judgment against the receiver, and second as failing to take into consideration other preferential claims asserted against the bank. *Denton vs. Baker*, 79 Fed. 189; *Richardson vs. Louisville Banking Co.*, 94 Fed. 442.

Respectfully submitted,

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

A. R. TITLOW, as Receiver of the
UNITED STATES NATIONAL BANK OF
CENTRALIA, and the UNITED STATES
NATIONAL BANK OF CENTRALIA,

Appellants,

vs.

ANNA E. McCORMICK,

Appellee.

No. 2653

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

APPELLEE'S BRIEF.

ELMER M. HAYDEN,
MAURICE A. LANGHORNE
FREDERIC D. METZGER
Solicitors for Appellee.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

A. R. TITLOW, as Receiver of the
UNITED STATES NATIONAL BANK OF
CENTRALIA, and the UNITED STATES
NATIONAL BANK OF CENTRALIA,

Appellants,

vs.

ANNA E. MCCORMICK,

Appellee.

No. 2653

STATEMENT OF FACTS

The facts in this case are few and simple, easily understood, and we trust not difficult of solution. Shortly stated they are as follows:

Some few days prior to August 22, 1913, Mrs. McCormick, the appellee, purchased from the United States National Bank of Centralia a large number of school warrants, all issued by School District No. 9, of Lewis County, Washington. She paid the bank therefor the sum of \$15,506.18. On August 22nd, 1913, appellee left these warrants with the bank for collection, and the bank thereupon gave her receipt, which, omitting the number and amount of the warrant described therein, reads as follows:

“Tacoma, Wash., Aug. 22, 1913.

Received from Mrs. Anna E. McCormick for
collection the following warrants, issued by School
District No. 9, Lewis County, Washington * * *

THE UNITED STATES NATIONAL BANK,
Centralia, Wash.

C. S. GILCHRIST, *Vice-President.*”

(Tr. pp. 11-16)

On January 31, 1914, the school district issued a call for the presentation for payment of warrants Nos. 3331, 3297, 3298 and 3299, aggregating with interest \$1659.54. On February 4th, 1914, these identical warrants were by the United States National Bank of Centralia presented to the county treasurer of Lewis county, who is by the statute of the state of Washington made *ex officio* treasurer of all school districts, for payment, and the county treasurer, in payment of these warrants, issued his check to the United States National Bank of Centralia, drawn on Coffman, Dobson & Company, Bankers, at Chehalis, for \$1747.04—the check including some other small items which caused it to total the amount named. Instead of remitting to the appellee the amount collected on the warrants the United States National Bank forwarded the check for \$1747.04 to Coffman, Dobson & Company, Bankers, at Chehalis, Washington, on whom it was drawn, with instructions to deposit the amount to its credit, which instructions were observed by Coffman, Dobson & Company, who gave the Centralia bank credit for the amount of the check, and the Centralia bank charged Coffman, Dobson & Company with a like amount. These two banks carried reciprocal accounts, and after this check was deposited, the United States National Bank of Centralia had to its credit with Coffman, Dobson & Company the sum of \$5,046.20 (Tr. pp. 46-47).

On April 11, 1914, School District No. 9 issued another call for outstanding warrants of the district, which call included all of the warrants owned by appellee and left with the United States National Bank of Centralia for collection. On April 14, 1914, this bank presented the remainder of said warrants to

the county treasurer for payment, and that officer paid the same by giving to the United States National Bank checks as follows:

1 check for \$3598.00, drawn on Security State Bank of Chehalis.

1 check for \$1765.06, drawn on Security State Bank of Chehalis.

1 check for \$4912.41, drawn on Chehalis National Bank, of Chehalis.

1 check for \$4061.77, drawn on Chehalis National Bank, of Chehalis.

All these checks were dated April 14th, 1914. The bank disposed of appellee's moneys represented by the checks in the following manner: The two checks, aggregating \$5363.06, drawn in favor of the United States National Bank on the Security State Bank were deposited with the Security State Bank and credit received by the Centralia bank therefor. That at the time of this deposit the Centralia bank was overdrawn with the Security State Bank in an amount in excess of the deposit. The remaining checks, amounting to \$8974.18, were on April 15, 1914, deposited by the Centralia bank with the Bank of California, of Tacoma. After this deposit was made there was a balance with the Bank of California of Tacoma to the credit of the United States National Bank amounting to \$19,988.02. The Bank of California was a reserve agent and correspondent at Tacoma of the Centralia bank. On April 14, 1914, the United States National Bank of Centralia had exhausted its credit balance with Coffman, Dobson & Company of Chehalis, and on April 27, 1914, its account with the Bank of California of Tacoma was also overdrawn, but on September 19, 1914, the date when the United States National Bank of Centralia

closed its doors and went into the hands of a receiver, it had a balance in its favor with the Bank of California of \$1585.36. (Tr. p. 35).

The United States National Bank of Centralia closed its doors on September 21, 1914, and a receiver was placed in charge of its assets. At the time this bank closed its doors there was actual cash on hand of \$27,899.81, and there were cash items of \$4,539.63, and a balance with banks who were reserve agents amounting to \$45,613.94, and a balance with banks not reserve agents of \$21,486.16, making a total of \$90,627.96. (Tr. p. 53)

On February 14, 1914, the date when the Centralia Bank deposited with the Bank of Coffman, Dobson & Company the check of \$1747.04, of which amount the sum of \$1548.36 belonged to appellee it had:

Actual cash in its vaults	\$ 66,381.40
Cash items	4,654.85
Balance with reserve agents . . .	50,295.18
Balance with non-reserve agents.	17,404.98

Total \$138,736.41

(Tr. p 67)

On April 15, 1914, the date when the Centralia bank deposited with the Security State Bank of Chehalis and the Bank of California, of Tacoma, the balance of appellee's funds realized from the payment of her warrants, it had:

Actual cash in its vaults	\$ 53,366.70
Cash items	10,787.02
Balance with reserve agents . . .	80,911.78
Balance with non-reserve agents	32,935.91

Total \$178,011.41

(Tr. pp 67-68)

Between February 14, 1914, and September 19, 1914, the latter date being the date when the bank closed, the lowest amount of the above aggregate sums, that is actual cash, cash items, balances with reserve agents, balances with banks not reserve agents, was \$90,627.96, distributed as follows:

Actual cash	\$ 22,464.30
Cash items	1,063.56
Balance with reserve agents ...	45,613.94
Balance with non-reserve agents	21,486.16

(Tr. pp. 52-53)

After cashing the warrants belonging to appellee, the officers of the United States National Bank of Centralia, deliberately concealed that fact and told appellee that her warrants had not been paid. (Tr. pp. 53-54)

Since the bank closed its doors its receivers have collected from persons owing the bank approximately \$200,000.00. (Tr. p. 68).

Appellee commenced this suit against the bank and its receiver to impress a trust in her favor upon its assets to the extent of the moneys received by it belonging to her. The lower court decreed a preference to the extent of \$10,054.69 only. The opinion of Judge Cushman, who tried the case in the lower court, has never been published in the Federal Reporter. It states the facts so clearly and applies the law so concisely that we take the liberty of making it a part of our statement. The opinion in full is as follows:

“Cushman, District Judge.

“This is a suit to establish a trust and right to payment in preference to general creditors out

of money coming into the hands of the receiver of the United States National Bank of Centralia, Washington.

“The plaintiff purchased certain school warrants of the United States National Bank and later returned them to that bank for collection, the bank giving plaintiff the following receipt:

‘Tacoma, Wash., Aug. 22, 1913.

‘Received from Mrs. Anna E. McCormick for collection the following warrants issued by School District No. 9, Lewis County, Washington * * * *

‘THE UNITED STATES NATIONAL BANK,
Centralia, Wash.

C. S. GILCHRIST, Vice-President.’

“The warrants were later paid by the county treasurer, who gave the United States National Bank checks as follows:

1 Check, \$3598.00, drawn on Security State Bank of Chehalis,

1 check, \$1765.06, drawn on Security State Bank of Chehalis.

Both checks being dated April 14, 1914;

1 check, \$4912.41, drawn on Chehalis National Bank.

1 check, \$4061.77, drawn on Chehalis National Bank.

Both of above checks being dated April 14, 1914.

1 check, \$1747.04, drawn on Coffman, Dobson & Co., Bankers, of Chehalis, Washington, and dated February 4, 1914.

“The bank did not pay the money over to plaintiff, nor advise her of its collection. Long after the collection of these warrants and shortly before the bank’s failure, upon inquiry at the bank by the

plaintiff's agent, he was informed that the warrants had not been paid.

“The checks received by the bank were deposited as follows:

“The check dated February 4, 1914, on Coffman, Dobson & Co., Bankers, of Chehalis, Washington, for \$1747.04 was, with other checks, deposited in that bank by the United States National Bank on February 6th, at which time there was a balance in that bank in favor of the United States National Bank, including this item, of over \$5000.

“On February 7th, after the deposit of plaintiff's check, there was a balance of \$6,053.43 with Coffman, Dobson & Co., Bankers, to the credit of the United States National Bank. This credit balance, on February 7th, was reduced in the ordinary course of dealing between the banks until upon the 14th of April, the account was overdrawn.

“Two checks—dated April 14, 1914, one for \$3598.00 and the other for \$1765.06—amounting in all to \$5363.06, were deposited April 15, 1914, with the Security State Bank of Chehalis. The United States National Bank was overdrawn with the Security State Bank of Chehalis at the time of the deposit considerably more than the amount of the deposit, which deposit was credited on such overdraft.

“The remaining checks—dated April 14, 1914, one for \$4912.41 and the other for \$4061.77—amounting to \$8974.18 were, on April 15, 1914, deposited with the Bank of California at Tacoma. As in the case with Coffman, Dobson & Co., Bankers, prior to, and at the time of this deposit, there was a balance with the Bank of California to the credit of the United States National Bank amounting at that time, \$19,988.02. Withdrawals by bank drafts and checks in the usual course of dealing with a correspondent bank were made the same day, reducing the balance in its favor on the 17th to

\$8,444.08. This amount was further reduced so that on the 27th day of April, the account was overdrawn.

“The Bank of California was a reserve agent and correspondent at Tacoma of the United States National Bank of Centralia, and sent its collections in the Centralia section to the United States National Bank for collection and credit.

“Coffman, Dobson & Co., Bankers, was a Chehalis bank, while the United States National Bank was a Centralia bank, and each bank, in the ordinary course of its banking business, received and cashed the checks of the other. The same course was followed by the Security State Bank, also a Chehalis bank, and the United States National Bank. The towns of Chehalis and Centralia are in the same county, being five or six miles apart.

“The lowest amount of cash held in the vaults of the United States National Bank on any date subsequent to the payment of these warrants and prior to the taking over of the assets by the receiver was on September 17, 1914, and amounted to \$23,527.86. The total cash at that time in the bank's vaults and with reserve agents and other correspondent banks not reserve agents was \$90,627.96. At the time the bank closed, September 19th, the cash on hand exceeded the above amount, the amount with reserve agents and other banks being substantially the same.

“Under the foregoing facts, it is clear that the bank did not become merely the debtor of the plaintiff, but that a trust is established in her favor upon such proceeds of the check as can be traced into the fund coming into the receiver's hands. This case, in its essential features—except as to the deposit with the Security State Bank of Chehalis—cannot be distinguished from the *Merchants National Bank v. School District No. 8* (94 Fed. 704), wherein it was said:

‘On July 11, 1896, the Helena bank gave the personal account of Palmer a credit on its books of the full amount of the proceeds of the sale of the bonds. Thereupon Palmer gave the bank his personal check for \$13,056, and requested that an account be opened as found by the master. Upon these facts it is contended that the money which was realized on the sale of the bonds was never actually deposited with the Helena bank. It is not material in this case whether it was actually so deposited or not. It is undisputed that the money belonged to the school district, and that it was deposited with the bank’s correspondent in Boston, and that upon the receipt of intelligence of such deposit, the Helena bank opened the account, and entered into the agreement which was indicated in the findings of the master. The Helena bank, if it had not then the money in its actual possession, had it under its control, and could lawfully, in the due course of banking, have paid it over to Palmer or to the school district. Instead of so paying the money, it chose to enter into the arrangement which was consummated. Neither the bank nor the receiver is now in a position to say that the money received by the bank’s agent was not actually received by the bank. The question is not complicated by any failure on the part of the Boston bank to pay up the Helena bank in full the amount which it received. The Helena bank received the money in the due course of business. In view of the receipt of that sum by its agent, and the arrangement which it made with Palmer on behalf of the school district, it will be deemed to have diverted from its funds in bank on July 11, 1896, the sum of \$13,056 and to have placed the same to the credit of the school district. That sum became and was from that date a trust fund subject to disbursement only upon the order of the school district. In *Bank v. Armstrong*, 148 U. S. 58, 13 Sup. Ct. 533, the court quoted

with approval the language of Mr. Justice Miller in *Marine Bank vs. Fulton Bank*, 2 Wall, 252, in which it was said:

‘All deposits made with bankers may be divided into two classes, namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter, and that other kind of deposit money peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker; and the latter, in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount, or any part thereof, on demand.’ (at pp. 707 and 708).

‘The later decisions of the same court: In re *J. M. Acheson Co.* (170 Fed. 427) and in re *Dorr* (196 Fed. 292), in no way modify the ruling in the *Merchants National Bank v. School District No. 8*; nor is the case of *Schuyler v. Littlefield* (232 U. S. 707) in any way at variance with that decision.’

“In *Schuyler v. Littlefield* (232 U. S. 707) the court was dealing with a bank deposit of a broker that was shown by the evidence to have been completely exhausted, dissipating the trust fund. The case now under consideration is one of a bank and the funds deposited by it with its correspondents and reserve agents, together with the actual money in its vaults at the time of the unlawful conversion of the plaintiff’s checks and at the time of its failure which will be treated as one fund.

“In the ordinary dealing between the United States National Bank and its correspondents, including Coffman, Dobson & Co., Bankers, and the Security State Bank, the presumption is that as the balance to its favor in these banks was re-

duced, it found its way either into the vaults of the United States National Bank or into its reserves with other banks. With the course of dealing pursued in this case, it is as certain that the cash fund coming into the receiver's hands from the vaults of the bank and from its reserve agents and correspondents was increased by the deposits made with the Bank of California and Coffman, Dobson & Co., Bankers, as it would be if the checks had been deposited with the United States Bank, itself.

“The grounds for presuming that thereafter the United States National Bank, in expending money, expended its own money and not that from the proceeds of these checks are likewise as strong in the former as in the latter case.

“When the methods in which exchanges and clearances between a bank and its correspondents of money tokens are considered, it is apparent that there is an equal, if not greater difficulty—if unaided by presumption, in tracing the proceeds from the deposits of checks made in the manner followed in this case than there would be in undertaking to trace coin deposited.

“In the foregoing quotation from *Merchants National Bank v. School District No. 8*, the court says:

‘The question is not complicated by any failure on the part of the Boston bank to pay to the Helena bank in full the amount which it received.’

This is a recognition of the prerequisite that, before a trust will be impressed upon a fund, it must be shown with reasonable certainty that the fund has been increased by the trust deposit.

“In the present case it is clear that, so far as the deposit with the Security State Bank of Chelalis is concerned, there can be no such certainty. It may be that such fund was increased by prevent-

ing its being depleted as it otherwise would have been, but for that deposit, by other expenditures from the fund; but there is an equal chance that it only added to the general assets of the company by preventing the curtailing of loans or discounts, or in other ways.

“Preference will be decreed plaintiff so far as the amount deposited in the Bank of California and Coffman, Dobson & Co., Bankers, is concerned. Plaintiff is not entitled to the full amount of these deposits, for one warrant of \$86.50, included in the Coffman, Dobson & Co., Bankers’ check was a warrant belonging to the United States National Bank and not to plaintiff. A further deduction will be made on account of interest accrued on the warrants at the date of sale to plaintiff, as such accrued interest was the property of the United States National Bank.

“The claim of preference so far as the Security State Bank is concerned is denied.

“Defendant has shown that there are other suits for the establishment of preference pending against the receiver and has asked that, in the event plaintiff is decreed a preference, that it be only such proportion thereof as plaintiff would be entitled to out of the fund actually in the bank’s vaults at the time of the bank’s failure, ratably with plaintiffs in other suits who shall prevail.

“The plaintiffs in these other suits are not parties to the present cause. Should the fund prove insufficient to answer all established preferences, all prevailing plaintiffs would have the right to be heard as to rights of preference among themselves. 39 Cly 540 and 541, note 38.

“Decree may be entered accordingly.”

ARGUMENT

This brief is being prepared prior to the service of appellant's brief, and we can only surmise what objections they will urge in their endeavor to procure a reversal of the decree entered by the lower court. We will assume that their position in this court will not be different from what it was in the lower court. In a memorandum brief filed with Judge Cushman, counsel for the receiver thus summarize their contentions. We quote therefrom as follows:

“We shall attempt to discuss very briefly in the following memorandum but one question, namely: Did the United States National Bank actually receive any money as the proceeds of Mrs. McCormick's warrants? The pertinent facts may be state briefly as follows:

1. As to the Coffman-Dobson transaction: The county treasurer's check of February 4th, on Coffman, Dobson & Co., represented approximately \$1500 of Mrs. McCormick's warrants. This check, with others, was sent to them on February 6th. At that time Coffman, Dobson & Co. owed the United States National Bank, including this item, approximately \$5000.00, \$1500.00 of which belonged to Mrs. McCormick. (We are, of course, assuming merely for the purpose of this argument that the court shall find that a trust relation was created originally, and not merely one of debtor and creditor.) The testimony shows that Coffman, Dobson & Co. cashed checks drawn on the United States National Bank by the latter's depositors; in other words, that Coffman, Dobson & Co. paid certain of the United States National Bank's debts. These checks were of course transmitted to the United States National and charged to the various depositors' accounts, and the checks returned to the depositors. The fact that the United States National

was at the same time paying similar obligations of Coffman, Dobson & Co. is immaterial, and if it were entitled to consideration at all, it would be an element favorable to the defendants. Both Coffman, Dobson & Co. and the United States National were *paying out* money on each other's account. Neither was *receiving* any money on the other's account. It cannot be argued, then, that in some vague way the United States National Bank received the benefit of the amount which Coffman, Dobson & Co. owed the United States National in any other way than that the Coffman bank paid certain obligations of the United States Bank. But this, under all the authorities, is insufficient to constitute a trust.

2. As to the Security State Bank of Chehalis transaction: This involved two checks amounting to \$5363.06. The United States Bank owed the Security Bank considerably more than that amount, and the United States Bank therefore merely credited itself upon its own books with the amount of these checks. It used them to pay a debt of its own. This is the simplest situation which the case at bar presents. The first indispensable prerequisite of the establishment of a trust is lacking, namely, any augmentation of assets.

3. As to the Bank of California transaction: This involved approximately \$9,000, and presents precisely the same legal situation as the Coffman, Dobson transaction. It was affirmatively shown that a substantial amount of the credit of the United States National with the California bank went to pay depositors of the United States National. As to the remainder of the fund, the record, so far as it speaks at all upon the subject, shows that it was expended in the payment of other of the debts of the United States National Bank. If the record were entirely silent upon these matters, complainant must fail, because the burden is upon her to trace the trust fund, either in the orig-

inal or some substituted form, into the assets which passed to the receiver.

The fact that the California bank was a reserve bank for the United States Bank is immaterial. If evidence be needed on this question, Mr. Stacy's testimony shows that the relation between banks in such circumstances is purely that of debtor and creditor. The reserve bank does not hold a fund sacredly set aside from the balance of its assets, but is merely a debtor to the amount of the reserve fund deposited with it. As expressed in Section 5192 of the Revised Statutes, 5 Fed. Statutes Annotated, p. 125, it is merely a 'balance due' from one association to another. Precisely the same principles apply as would obtain in case the trust fund had been traced into the hands of a private individual.

The legal effect of all of the foregoing transactions is therefore that the proceeds of Mrs. McCormick's warrants were used in paying the debts of the United States National Bank. Counsel for complainant answers this argument by saying that it is presumed that the United States National Bank used its own funds for the purpose of paying its debts. This presumption is not to be indulged in where the record conclusively proves the contrary. Counsel points to the fact that at the various dates mentioned United States National Bank had more than enough cash in its vaults to pay the complainant's claim. *That would be material if the complainant's fund had been traced into the vaults of the bank.*"

It will thus be noted that counsel for the receiver take the position that appellee is not entitled to recover because her moneys had not been "traced into the vaults of the bank." We suppose by this that counsel means that the money received by the Centralia Bank on the checks of the County Treasurer

of Lewis county in payment of appellee's school warrants was not actually placed in the vaults of that bank. If this be their contention, then it is met and answered by the decision of this Court in the case of *Merchants National Bank vs. School District No. 8*, 94 Fed., 707. And also in the decision of the United States Supreme Court in the case of *Commercial National Bank vs. Armstrong*, 148 U. S. 50-58, 37 L. Ed., 363, where the court, speaking through Justice Brewer, said:

“We also agree with the Circuit Court in conclusions as to those moneys collected by sub-agents to whom the Fidelity was in debt, and which collections had been credited by the sub-agents upon the debts of the Fidelity to them before its insolvency was disclosed, for there the money had practically passed into the hands of the Fidelity, the collection had been fully completed. It was not a mere matter of bookkeeping between the Fidelity and its agents; *it was the same as though the money had actually reached the vaults of the Fidelity.* * * * * ”

In *Merchants National Bank vs. School District*, *supra*, this Court, in speaking of the same identical proposition, said:

“The question is not complicated by any failure on the part of the Boston bank to pay to the Helena bank in full the amount which it received.”

See also:

Montague vs. Pacific Bank, 81 Fed., 602;
Moreland vs. Brown, 86 Fed., 257;
Brenam vs. Tillinghast, 201 Fed., 609;
Massey vs. Fisher, 62 Fed., 958;
Myers vs. Board of Education, 32 Pac., 661;

Peak vs. Ellicott, 1 Pac., 499;

Capital National Bank vs. Coldwater National Bank, 69 N. W., 115;

First National Bank vs. Hummel, 23 Pac., 989;

Anderson vs. Pacific Bank, 44 Pac., 1063;

San Diego County vs. California National Bank, 52 Fed., 59.

In view, then, of the decision of this Court in *Merchants National Bank vs. School District*, *supra*, and of the United States Supreme Court in *Commercial National Bank vs. Armstrong*, *supra*, we can safely assert that it is not indispensable to the success of appellee that she show that her moneys so received by the Centralia bank were actually deposited in its vaults. It is the theory of counsel for the receiver that unless this was done she cannot recover. As the fallacy of a proposition can best be shown by distorting it, we may presume that had the Centralia bank taken appellee's money and actually deposited it in its own vaults, then there would, in view of the fact that at all times thereafter the bank had on hand and in its vaults a sum of money largely in excess of the amount received by it belonging to the complainant, be no question as to her right to a preference. But, argued counsel for the receiver in the lower court, the Centralia bank deposited complainant's money with its correspondents and reserve agents and afterwards checked out the same in payment of its debts to its depositors; and therefore appellee's rights to a preference cannot be sustained because, to use the language of counsel for receiver, "the first indispensable prerequisite to the establishment of a trust is lacking, namely, any augmentation

of assets.” In other words, a trick in bookkeeping by the officers of the bank is all that is necessary to defeat her right to a preference. It is just such absurd technicalities as indulged in by counsel for the receiver that often bring odium and reproach upon the administration of the law.

We are all familiar with that masterpiece of Mother Goose, wherein she traced the extermination of vermin in Jack’s house to causes so remote as the crowing of cocks and the milking of cows. No doubt counsel for the receiver are inspired with the same genius as this great poetess, when they argue that appellee is not entitled to a preference unless she can show the indential money received by the bank for her use use was ear-marked, tagged and actually deposited in its vaults. One is just as reasonable as the other, and of the two, the former will find more supporters.

Moneys of appellee received by the Centralia bank, deposited by it with Coffman, Dobson & Company and the Bank of California, were withdrawn by the Centralia bank in the usual course of business. This is admitted by counsel for the receiver. This is tantamount to admitting that the Centralia bank received appellee’s money in the due course of business, and this being true, it will be deemed to have diverted from its own funds in the bank an amount equal thereto, and to have placed the same to the credit of appellee.

Merchants National Bank vs. School District, supra.

National Bank vs. Insurance Co., 104 U. S., 54.

As we have noted, a similar state of facts confronted this Court in the Merchants National Bank case just cited. Counsel for the receiver in that case contended the school district was not entitled to a preference because "the money was never actually deposited with the Helena Bank." In answer to that contention this Court said:

"The Helena Bank, if it had not then the money in its actual possession, had it under its control, and could lawfully, in the due course of banking, have paid it over to Palmer, or to the school district. Instead of so paying the money, it chose to enter into an arrangement which was consummated. Neither the bank nor the receiver is now in a position to say that the money received by the bank's agent was not actually received by the bank."

In the case of *Brennan vs. Tillinghast*, 201 Fed., 609, it appears from the statement of facts in that case that the complainant borrowed from the First National Bank of Ironwood, Michigan, the sum of \$1,000.00, and at the same time deposited with the bank as collateral for his note some 200 shares of the capital stock of the Arizona Copper Company. Afterwards Brennan deposited with the Ironwood bank the sum of \$1,000, for which he received a certificate of deposit. "This deposit," says the court, in its opinion, "was received by the cashier of the bank with the understanding at the time that it was to be used in paying Brennan's note at maturity." Thereafter the Ironwood bank, without the knowledge or consent of Brennan, sold 195 shares of the stock of the copper company which it held as collateral to his note, receiving therefor the sum of \$3,558.75, and thereupon it deposited that amount in the City Na-

tional Bank of Duluth, Minnesota, to its credit. At the time of this deposit the Ironwood Bank had a pre-existing open account with the Duluth Bank. Against this account it drew its drafts in the usual way, until its credit with the Duluth Bank was exhausted, and on May 11, 1909, the Ironwood Bank owed the Duluth Bank a sum in excess of \$1,000.00. The Ironwood Bank closed its doors on June 21, 1909, with a sum of money in its vaults in excess of \$8,000.00. On this state of facts it was held that Brennan was entitled to a preference for the amount of his claim over the common creditors of the Ironwood Bank. We excerpt from the opinion the following pertinent quotation:

“It is undisputed that the proceeds of the sale of the Brennan stock, wrongfully converted by the Ironwood Bank to its own use, constituted a trust fund, which did not lose this character when mingled with other moneys of the bank, and that Brennan was entitled to recover the amount thereof as a preferred claim, if, and to the extent that, he sustained the burden of proof of tracing this money, either in its original shape or in a substituted form, into the moneys which came into the hands of the receiver as part of the assets of the bank. * * * And proof that the tort-feasor has mingled the trust funds with his own and made payments thereafter out of the common funds, is, nothing else appearing, a sufficient identification of the remainder of that fund coming into the hands of the receiver, not exceeding the smallest amount the fund contained subsequent to the commingling, as trust property, under the legal presumption that he regarded the law and neither paid out the trust fund, nor invested it in other property, but kept it sacred.”

Upon the hearing in the lower court it was

argued by counsel for the receiver, and the same argument will no doubt be made in this court, that the cash assets of the Centralia Bank were not increased in the hands of the receiver by the receipt of moneys of appellee, and hence there could be no recovery. What mental process was employed to arrive at this result we are at a loss to determine. The trust fund became a part of the money assets or cash fund of the Centralia bank, and was a part of this fund when the bank failed.

Empire State Surety Co. vs. Carroll County,
194 Fed. 593, 605;

Perry on Trusts, Secs. 828, *et seq.*;

City of Centralia vs. U. S. National Bank,
221 Fed., 755;

National Bank vs. Insurance Co., 104 U. S.,
54-66;

Erie R. Co. vs. Dial, 140 Fed., 689.

In *City of Centralia vs. U. S. National Bank*, *supra*, speaking to this identical proposition, the court says:

“The fact that the correspondent bank collected the purchase price of the bonds and gave the United States National Bank credit, not remitting coin or currency, in principle does not change the rule. The correspondent bank was the agent of the United States National Bank and an authorized reserve bank. The agent’s possession was possession of the principal. If the National Bank of Commerce had remitted the United States National Bank by draft on New York or Chicago, it would not, thereby, any more nearly have gotten the actual money collected into the vaults of the United States National Bank than was done by the National Bank of Commerce giving the United States Bank credit, which was drawn against by the latter in the regular course of business.

“The cash items, including cash, handled daily by a bank, constitutes a particular fund, aside from its general assets and property. It is recognized as a separate fund by section 5191 R. S. (5 Fed. State Ann., 124). A fund of this character is so liquid in its nature that a trust fund once traced into it, the attempt, unaided by presumption, to separate it from the mass is as futile as to pick a wanted coin from a bag of its fellows. The money being received and the credit given by the treasurer, the proceeds of these bonds entered into this cash fund of the United States National Bank, and thereafter, in expending money from this fund, whether paid out over the bank’s counter in Centralia, or by draft, or check, on the Seattle correspondent and reserve bank, or upon any of its other correspondents and reserves, to which it may have shifted its credit in the National Bank of Commerce, the presumption would be that such expenditure was from the bank’s money, and that the trust fund remained untouched, as much so as though the money were taken from one stock or another of coin upon the bank’s own counter.

“With the constant and daily shifting of cash credits and balances, forth and back, and between the bank and its correspondents, there is no more of a presumption that the trust fund remained with the correspondent bank until wiped out by the overdraft than there would be if it were traced, with other money, into a particular drawer on entering the bank, (one of a number of drawers into which coin was daily placed and from which it was as often taken), which particular drawer was found empty upon the bank’s failure—that it had been lost and dissipated, though money remained in the other drawers. Neither the rule in *San Diego County vs. California National Bank* (C. C.) 52 Fed. 59, nor that in *Multnomah County vs. Oregon National Bank* (C. C.) 61 Fed. 912, is opposed to the present holding, and it is not clear

that either of those cases is opposed to the holding of the other. Each of them was determined on demurrer.”

See also:

Widman vs. Kellogg, 133 N. W. 1020,
39 L. R. A., N. S., 563;

Anheuser-Busch vs. Morris, 36 Neb., 31, 53
N. W., 1037.

But all other questions to the contrary, we insist that neither the bank nor its receiver should now be heard to assert that it paid out its money belonging to complainant, instead of its own money. Commenting upon this proposition the Supreme Court of North Dakota said:

“And why, we ask, should the bank, or the receiver standing in its stead, be heard to assert as against the rightful owner of moneys, that in paying creditors of the bank it paid money that belonged to appellant, and which it held in a trust capacity, instead of paying its own money? To hold that the bank may take such a position, and maintain it in a court of equity, seeking to do equity, would be to permit the bank to take advantage of its own wrong, for its own benefit, and to the detriment of the innocent party it has injured.”

In view of the decision of this Circuit in *Merchants National Bank vs. School District*, *supra*, we do not feel called upon to pursue the subject at any further length.

The decree entered in the court below should be affirmed.

Respectfully submitted,

ELMER M. HAYDEN
MAURICE A. LANGHORNE,
FREDERIC D. METZGER.

Solicitors for Appellee

United States
Circuit Court of Appeals
For the Ninth Circuit.

COLLIN MURRAY,

Appellant,

VS.

SIOUX ALASKA MINING COMPANY, a Corporation, H. M. SMITH, HASTINGS CREEK DREDGING COMPANY, a Corporation, and JOSEPH BELLEVIEW,
Appellee.

Transcript of Record.

Upon Appeals from the United States District Court for the District of Alaska, Second Division.

Filed

FEB 4 - 1916

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

COLLIN MURRAY,

Appellant,

vs.

SIOUX ALASKA MINING COMPANY, a Corporation, H. M. SMITH, HASTINGS CREEK DREDGING COMPANY, a Corporation, and JOSEPH BELLEVIEW,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of] Attorneys of Record.

WILLIAM A. GILMORE, Nome, Alaska,

T. M. REED, Nome, Alaska,

Attorneys for Plaintiff.

G. J. LOMEN, Nome, Alaska,

Attorney for Defendants, Joseph Belleview
and Sioux-Alaska Mining Co. [1*]

*In the District Court for the District of Alaska,
Second Division.*

[Minutes of Court—July 3, 1915—Re Opinion, etc.]

TERM MINUTES, Special 1915 Term, Beginning
January 11, 1915.

Saturday, July 3, 1915, at 10 A. M.

Court convened pursuant to adjournment.

Honorable J. R. TUCKER, District Judge presiding.

Upon the convening of court, the following proceedings were had:

2602.

COLLIN MURRAY,

vs.

SIOUX-ALASKA MINING CO. et al.

Oral opinion announced, sustaining the motion to vacate the injunction and sustaining the demurrers of Joseph Belleview and Sioux-Alaska Mining Company, and denying plaintiff's motion for an injunction *pendente lite*.

William A. Gilmore, attorney for plaintiff, took exception to the ruling on each of the foregoing mat-

*Page-number appearing at foot of page of original certified Record.

ters. Exceptions allowed.

Counsel for plaintiff then gave notice of intention to take an appeal and asked that a sum be set for the supersedeas bond. After some argument by counsel as to the amount of same was taken under advisement.

On motion of counsel for plaintiff, thirty days granted in which to prepare and file bill of exceptions. Stay of proceedings granted in the interim. [1a]

*In the District Court for the District of Alaska,
Second Division.*

No. 2602.

Bill of Exceptions.

COLLIN MURRAY,

Plaintiff,

vs.

SIoux-ALASKA MINING CO., a Corporation,
H. M. SMITH, HASTINGS CREEK
DREDGING CO., a Corporation, and JO-
SEPH BELLEVIEW,

Defendants.

BE IT REMEMBERED that on the 15th day of June, 1915, a complaint was filed herein by the plaintiff in words and figures as follows: (Title of court and cause omitted in all papers herein contained, being in all cases the same as the title of the court and cause of this Bill of Exceptions.)

Complaint.

[Title of Court and Cause.]

Comes now the plaintiff above named and for cause of action against the above-named defendants alleges as follows:

I.

That the defendant Sioux-Alaska Mining Company, is a corporation organized and existing under and by virtue of the laws of the State of South Dakota and at all times herein mentioned was and is authorized to do business in the District of Alaska and in the Second Division thereof.

II.

That the defendant, Hastings Creek Dredging Company is and was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Illinois and authorized and doing business in the District of Alaska, in the Second Division thereof. [2]

III.

That between the first day of March, 1910, and the first day of May, 1912, the plaintiff, at the instance and request of the defendant, Sioux-Alaska Mining Company, performed services at an agreed and reasonable value, and advanced certain monies for expenses for said defendant, amounting in all to the total sum of Three Thousand, Eight Hundred Ninety-five and 93/100 (\$3,895.93) Dollars, and thereupon the plaintiff demanded payment of said amount from said defendant, which said defendant refused, and ever since has refused, to pay the same

or any part thereof. That there is now due and owing from said defendant Sioux-Alaska Mining Company to the plaintiff for said services and cash advanced at its instance and request, the sum of **THREE THOUSAND EIGHT HUNDRED NINETY-FIVE** and $93/100$ (\$3,895.93) **DOLLARS**, together with interest thereon at the legal rate of eight per cent (8%) per annum from said first day of May, 1912, to date, said interest amounting to the sum of nine hundred seventy-three and $47/100$ (\$973.47) dollars, being the total sum of **FOUR THOUSAND EIGHT HUNDRED SIXTY-NINE AND $40/100$ (\$4,869.40) Dollars.**

IV.

That on or about the —— day of ——, 1912, the said defendant Sioux-Alaska Mining Company made, executed and delivered a certain bill of sale to the defendant H. M. Smith of a certain bucket dredge then owned by said company and located on Moss Gulch, a tributary of Nome River, in the Cape Nome Mining & Recording District, District of Alaska, and which was subsequently removed to and is now lying and being on Hastings Creek in the Cape Nome Mining & Recording District, Alaska, the said transfer being made as security to said H. M. Smith for the payment of the sum of fifty-five hundred (\$5,500) dollars borrowed by said defendant from the said H. M. Smith on or about said time. That subsequently the said H. M. [3] Smith sold the said dredge to one W. H. Knowles and one A. M. Hansen for the sum of Fifteen Thousand (\$15,000) Dollars, receiving from the said Knowles and Hansen the sum

of Six Thousand (\$6,000) Dollars, which said sum was applied by the said H. M. Smith in payment of the said loan and indebtedness of the said Sioux-Alaska Mining Company to him, the said H. M. Smith. That at the time the said bill of sale was made by said Sioux-Alaska Mining Company, to the said H. M. Smith, it was distinctly understood and agreed between the parties thereto that the said H. M. Smith should act as the Trustee for said Sioux Alaska Mining Company and hold the legal title by said bill of sale to the said dredge and that all of the proceeds from the sale or disposal thereof above the sum of fifty-five hundred (\$5,500) dollars should be paid immediately thereafter upon the receipt of the same to the said Sioux-Alaska Mining Company. That at the time the said bill of sale was made, the said Sioux-Alaska Mining Company had no other property, real or personal, save and except a few worthless and worked-out mining claims on the said Moss Gulch above mentioned, which said mining claims, the plaintiff is informed and believes, have since been allowed to forfeit and have been abandoned by the said defendant. That said defendant Sioux-Alaska Mining Company is totally and wholly insolvent and has no assets or property, real or personal, other than this equitable interest in the proceeds from the said mortgage held by the said H. M. Smith above alleged.

That thereafter and during the month of December, 1914, the said H. M. Smith, in an equitable action entitled H. M. Smith, plaintiff, versus W. H. Knowles and A. M. Hansen, et al., defendants, in the

above-entitled court, commenced a foreclosure proceeding to collect the balance due on said mortgage from the said Knowles and Hansen and obtained a decree of foreclosure in his favor. That the said H. M. [4] Smith, as such plaintiff, has obtained an execution and under the execution decree of the court has sold all of the right, title and interest of the said Knowles and Hansen in said dredge, and on this, the 15th day of June, 1915, purchased at marshal's sale all of the right, title and interest of said parties in and to the said dredge.

That at all the times herein mentioned the said H. M. Smith was acting as trustee for said Sioux-Alaska Mining Company and all of the acts and actions on the part of said H. M. Smith were authorized and conducted in the name of said H. M. Smith for and on behalf of said insolvent corporation.

That on the 2d day of March, 1915, the said H. M. Smith, acting in his own name for said defendant Sioux-Alaska Mining Company, entered into a written agreement with the defendant Joseph Belleview for and on behalf of himself and said defendant Hastings Creek Dredging Company, a corporation, the exact terms and conditions of said agreement being unknown to the plaintiff, but the plaintiff is informed and believes that the said Joseph Belleview, for and on behalf of himself and the said Hastings Creek Dredging Company, agreed to pay to the said H. M. Smith for the defendant Sioux-Alaska Mining Company the sum of SEVEN THOUSAND (\$7,000) DOLLARS for said dredge as soon as the said H. M. Smith could complete the foreclosure proceedings

and deliver title to said dredging machine.

That said H. M. Smith, for and on behalf of said defendant Sioux-Alaska Mining Company, is about to deliver the possession and title of said dredge to the said Joseph Belleview and Hastings Creek Dredging Company, and the said Belleview and Hastings Creek Dredging Company are about to pay, or cause to be paid, to said H. M. Smith for the said Sioux-Alaska Mining Company, the consideration therefor, to wit, the sum of Seven Thousand (\$7,000) Dollars.

[5]

V.

That the said H. M. Smith is a nonresident of the District of Alaska and resides in the State of South Dakota. That said Joseph Belleview is a resident of the town of Nome, Alaska, and is now in the town of Nome, Alaska, or vicinity. That the representatives of all of the other defendants are within the jurisdiction of the court and accessible to service or process. That it is impossible for the plaintiff herein to get service on said H. M. Smith or to bring him within the jurisdiction of the Court or the equity process of the Court. That the said Sioux-Alaska Mining Company purposely, deliberately, fraudulently and designedly chose and selected the said H. M. Smith as its trustee so as to prevent the plaintiff herein from compelling the said Smith to account in the district where the said dredge is located. That the plaintiff has been trying to collect the money due him from the said defendant Sioux-Alaska Mining Company ever since May, 1912, and by reason of the fact that said defendant has no property, real

or personal, and by reason of the fact that said insolvent defendant has placed its personal property in the name of said H. M. Smith, it was impossible for the plaintiff to reach the said defendant by any legal process permitted or allowed by law. That it is now impossible, by legal process, to attach, garnish, or reach the said proceeds of the said sale and unless the court restrains the said defendants Belleview and Hastings Creek Dredging Company from paying said amount, or any part thereof, to the said H. M. Smith, or the said defendant Sioux-Alaska Mining Company, said fund will be paid over by the said Belleview and Hastings Creek Dredging Company and the same wasted and dissipated and placed beyond the reach of any legal process within the means of reach of this plaintiff. That it would be fruitless and involve useless and unnecessary expense for this plaintiff to commence and maintain any [6] action at law against the said Sioux-Alaska Mining Company because said defendant is insolvent and has no other assets or property of any kind or character other than this equitable claim to the said fund to be paid over by said defendants Belleview and Hastings Creek Dredging Company to said H. M. Smith for and on its behalf. That because and on account of all of said facts plaintiff files this creditor's bill instead of an action at law. That unless the Court grants the plaintiff an injunction enjoining said defendants as above alleged, the plaintiff will be unable to obtain any relief against the said Sioux-Alaska Mining Company.

WHEREFORE plaintiff prays the Court as follows:

First. For a judgment and decree of the Court against the defendant Sioux-Alaska Mining Company for the sum of FOUR THOUSAND EIGHT HUNDRED SIXTY-NINE and 40/100 (\$4,869.40) DOLLARS together with interest on the sum of \$3,895.93 from date until paid.

Second. For an injunction *pendente lite* restraining and enjoining defendants Joseph Belleview and the Hastings Creek Dredging Company from paying the said defendant H. M. Smith the consideration for the transfer and sale of said dredge mentioned in the complaint herein, or any part of said consideration, until the further order of the Court.

Third. That the said defendant H. M. Smith be adjudged to be the trustee of the defendant Sioux-Alaska Mining Company and on the final hearing of this case that the said H. M. Smith and the said defendants Joseph Belleview and Hastings Creek Dredging Company be ordered and compelled to pay the said consideration of Seven Thousand (\$7,000) Dollars, or so much thereof as may be due the plaintiff herein, into the registry of the Court for the satisfaction and payment of any decree obtained by the plaintiff herein.

Fourth. That the plaintiff do have and recover of and from the said Sioux-Alaska Mining Company all of his costs and disbursements [7] herein.

Fifth. That the Court grant such other and further order and relief in the premises as shall seem to

the Court meet and proper.

T. M. REED, and

WILLIAM A. GILMORE,

Attorneys for Plaintiff.

United States of America,

Territory of Alaska,—ss.

William A. Gilmore, being duly sworn, on oath deposes and says: That he is one of the attorneys for the plaintiff in the above-entitled cause. That he has read the above and foregoing complaint, knows the contents thereof and the same is true as he verily believes. That he makes this verification for and on behalf of the plaintiff because the said plaintiff is temporarily absent from the Second Division of the District of Alaska.

WILLIAM A. GILMORE.

Subscribed and sworn to before me this 15th day of June, 1915.

[Seal]

D. B. CHACE,

Notary Public for the Territory of Alaska, Residing at Nome.

(My commission expires May 12th, 1917.)

[Endorsed]: Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome, June 15, 1915. G. A. Adams, Clerk.

BE IT FURTHER REMEMBERED that at the same time of filing said complaint the plaintiff thereupon filed the affidavit of William A. Gilmore, said affidavit being in words and figures as follows, to wit:

[8]

[Title of Court and Cause.]

United States of America,
Territory of Alaska,—ss.

Affidavit of William A. Gilmore.

William A. Gilmore being duly sworn on oath deposes and says: That he is one of the attorneys for the plaintiff Collin Murray in the above-entitled action.

That he has in his possession letters and statements showing that the defendant Sioux-Alaska Mining Company, a Corporation, is indebted to the said plaintiff in the sum demanded in the complaint. That affiant for the past two years has been employed by the plaintiff to take legal proceedings to collect the said amount from said defendant Sioux-Alaska Mining Company but on account of the fact that said Sioux-Alaska Mining Company is insolvent and has no assets and because affiant was unable to secure and take any legal proceedings allowed by law to reach any property belonging to said company, it has been impossible for the plaintiff to obtain any relief against the said defendant. That affiant knows of no legal process by which the fund described in the complaint can be reached and therefore has advised the plaintiff to commence an equitable action by filing a creditor's bill in order to obtain the injunctive relief of the Court enjoining the trust fund from being collected or paid over until the plaintiff can have his rights adjudicated.

That affiant is informed and believes that one H.

S. Sandvig of Baltic, So. Dakota, is the Secretary of the defendant Sioux-Alaska Mining Company, a cor. That annexed hereto and marked exhibit "A" and made a part of this affidavit is a letter from the said H. S. Sandvig to the plaintiff bearing date March 5th, 1915, wherein the said secretary of said defendant admits that the said defendant H. M. Smith has been paid the sum of Five Thousand (\$5,000) Dollars, and wherein the said secretary admits that said Smith is the trustee of [9] said defendant Sioux-Alaska Mining Company, a cor.

That affiant is acquainted with and knows one A. M. Hansen, a member of the partnership of Hansen & Knowles, who executed the mortgage described in the complaint. That yesterday, the 14th day of June, 1915, said A. M. Hansen, in the town of Nome, Alaska, informed affiant personally that in addition to said sum of five thousand dollars mentioned in said exhibit "A" annexed hereto that said Hansen & Knowles paid to the said Smith an additional sum of one thousand (\$1,000) dollars in two payments of five hundred dollars each, making more than the amount due the said Smith from the said Sioux-Alaska Mining Company, a cor. for said loan mentioned in the exhibit annexed hereto.

That affiant does not know of any other property, real or personal, belonging to or of any value whatever of the said defendant Sioux-Alaska Mining Company and knows of no other remedy by which the plaintiff herein can obtain justice other than by the equitable injunctive relief demanded in the plaintiff's complaint.

That affiant is informed and believes that the said H. M. Smith has already contracted and sold the said dredge to the said Joseph Belleview and the Hastings Creek Dredging Company, a cor. mentioned in the complaint and that as soon as the marshal's title is completed in the said H. M. Smith by reason of the execution and sale thereof, the said Belleview and Hastings Creek Dredging Co. will pay, or cause to be paid, the said note to the said H. M. Smith or the said Sioux-Alaska Mining Company in the State of South Dakota or elsewhere and remove the said fund beyond the jurisdiction of the Court

WHEREFORE affiant makes this affidavit for and on behalf of the plaintiff to inform the Court of the facts and to support the plaintiff's motion for an injunction enjoining said Joseph Belleview and Hastings Creek Dredging Company from paying said fund [10] to the said H. M. Smith or the said Sioux-Alaska Mining Company until this plaintiff's cause of action can be heard on its merits.

WILLIAM A. GILMORE.

Subscribed and sworn to before me this 15th day of June, 1915.

[Seal]

D. B. CHACE,

Notary Public for the Territory of Alaska, Residing at Nome.

(My commission expires May 12th, 1917.)

Exhibit "A" [to Affidavit of William A. Gilmore].

Baltic, S. Dakota, Mar. 5th, 1915.

Mr. Collin Murray,
Aberdeen, S. D.

Dear Friend:

I received your letter of recent date and see thereby that you are now in the Dakota Blizzard country.

You inquire about the Dredge proposition. This mining business got to be slow business. I thought we some time would get through with it, so that we could forget it, but it does not seem so.

A mortgage on the dredge was given Mr. Smith when we made that \$5,500 loan and last year the dredge was turned over to him in payment of this loan. Of course it is the understanding that he is to return to this Company what he get over on the indebtedness.

He sold the dredge for \$1,500. He has received \$5,000 and now they have gone bump and it doesn't seem that more can be done with them. He is now to turn it over to a party from Chicago, but the cash payment is small and it all depends on what the ground is that they are going to put it on.

If that first deal had gone through all right we would have got our assessments back and paid our debts, but now it doesn't [11] look so bright. There is still some balance due on that note to pay and also other indebtedness here of about \$800.

If these last parties have the ground we may get something yet, but otherwise we will be where we

are. This is the situation.

Your friend,
(Signed) H. S. SANDVIG.

[Endorsed]: Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. June 15, 1915. G. A. Adams, Clerk.

BE IT FURTHER REMEMBERED at the same time the plaintiff filed his motion for a restraining order, which said motion was in words and figures as follows, to wit:

[Title of Court and Cause].

Motion for Restraining Order.

Comes now the plaintiff by and through his attorneys and moves the Court for an injunction *pendente lite* against the defendants enjoining and restraining them from paying any part or portion of the consideration of the sale and transfer of that certain bucket dredge now located and situated on Hastings Creek in the Cape Nome Mining District, District of Alaska, and in the meantime for a restraining order so enjoining and restraining said defendants, and each of them, and particularly the defendants Joseph Belleview and Hastings Creek Dredging Company from paying any part or portion of said consideration of said transfer to the said defendant, H. M. Smith, or the defendant Sioux Alaska Mining Company, or anyone else on its behalf.

This motion is made and based upon the complaint herein and the affidavit of William A. Gilmore made, served and filed herewith [12] and on all other records and files of said action.

Dated at Nome, Alaska, this 15th day of June, 1915.

T. M. REED and
WILLIAM A. GILMORE,
Attorneys for Plaintiff.

[Endorsed]: Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome, June 15, 1915. G. A. Adams, Clerk.

BE IT FURTHER REMEMBERED that the plaintiff herein filed his certain undertaking in the sum of \$1,000 with two good and sufficient sureties, said bond approved by the Court, in support of his motion for a temporary restraining order and an order to show cause and thereupon the Court entered its certain written order to show cause and restraining order in words and figures as follows, to wit:

[Title of Court and Cause.]

Restraining Order and Order to Show Cause.

This matter coming on for hearing *ex parte* before the Court on motion of the plaintiff's attorneys for an injunction *pendente lite* and for a temporary restraining order restraining and enjoining the defendants Joseph Belview and Hastings Creek Dredging Company, a corporation from paying or causing to be paid, any fund or purchase money to defendant H. M. Smith, or the defendant Sioux-Alaska Mining Company, or either of them, or to anybody else for and on their behalf for the purchase of that certain bucket dredge now lying and being on Hastings Creek in the Cape Nome Mining & Recording District, District of Alaska, and formerly owned by said Sioux-Alaska [13] Mining

Company, and the Court being otherwise fully advised in the premises, now ORDERS AND DIRECTS that you, the said Sioux-Alaska Mining Company, H. M. Smith, Joseph Belleview, and Hastings Creek Dredging Company, and each of you, show cause, if any you have, before the Court in open court at the courtroom of the courthouse at Nome, Alaska, at 10 o'clock A. M. on the 21st day of June 1915, why an injunction *pendente lite* should not be entered herein enjoining the defendants Joseph Belleview and the Hastings Creek Dredging Company from paying, or causing to be paid, any fund or sum of money or purchase price to the defendant H. M. Smith or the defendant Sioux-Alaska Mining Company for the sale and purchase of that certain bucket dredge now lying and being on Hastings Creek in the Cape Nome Mining & Recording District, District of Alaska, formerly owned by the said Sioux-Alaska Mining Company, and in the meantime you, the said Sioux-Alaska Mining Company, H. M. Smith, Joseph Belleview and Hastings Creek Dredging Company, and each of you, are hereby restrained from paying or causing to be paid or satisfied, or causing to be satisfied, the said sale and purchase price of the said dredge above the described and particularly are you, Joseph Belleview and Hastings Creek Dredging Company, and each of you, are hereby restrained until the further order of the court from paying, or causing to be paid, to H. M. Smith, or the Sioux-Alaska Mining Company, or either of them, or to anybody on their behalf, any of the purchase money contracted for, or to be paid

by you, for the purchase of the said bucket dredge formerly owned by the Sioux-Alaska Mining Company and now lying and being on Hastings Creek in the Cape Nome Mining & Recording District of Alaska.

Done in chambers this 15th day of June, 1915.

J. R. TUCKER,
District Judge.

[Endorsed]: Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome June 15, 1915. G. A. Adams, Clerk. [14]

United States of America,
District of Alaska,
Second Division,—ss.

I HEREBY CERTIFY that I received the annexed restraining order and order to show cause at Nome, Alaska, on the 15th day of June, 1915, and thereafter on the same day I served the same at Nome, Alaska, upon the Hastings Creek Dredging Company, by delivering and leaving with Joseph Bellevue as president and manager of said company, a copy thereof.

And thereafter on the same day I served the same at Nome, Alaska, upon Joseph Bellevue by delivering and leaving with him a copy thereof.

Returned this 16th day of June, 1915.

E. R. JORDAN,
United States Marshal.
By A. B. Miller,
Deputy.

Marshal's costs: 2 Services, \$12.00.

[Endorsed]: Filed in the office of the clerk of the District Court of Alaska, Second Division at Nome, June 16, 1915.

G. A. ADAMS,
Clerk.

BE IT FURTHER REMEMBERED that thereafter on the 21st day of June, 1915, the defendant Sioux-Alaska Mining Company, a corporation, filed a demurrer to plaintiff's complaint, which said demurrer is in words and figures as follows, to wit:

[Title of Court and Cause.]

Demurrer [of Sioux-Alaska Mining Co.].

Now comes the Sioux-Alaska Mining Company, a corporation, and demurs to the complaint herein on the ground and for the reason [15] that it appears on the face of the complaint,

First. That said Court has no jurisdiction of the subject matter of said action.

Second. That said complaint does not state facts sufficient to constitute a cause of action as against this demurring defendant.

G. J. LOMEN,
Attorneys for Defendant Sioux-Alaska Mining
Company, a Cor.

Service admitted June 21, 1915.

WILLIAM A. GILMORE,
Attys. for Plff.

[Endorsed]: Filed in the office of the clerk of the District Court of Alaska, Second Division, at Nome, June 21, 1915. G. A. Adams, Clerk.

BE IT REMEMBERED that thereafter and on

the 21st day of June, 1915, the defendant Joseph Belleview filed a demurrer to plaintiff's complaint, said demurrer being in words and figures as follows, to wit:

[Title of Court and Cause.]

Demurrer [of Joseph Belleview].

Now comes Joseph Belleview and demurs to the complaint herein on the ground and for the reason that it appears on the face of the complaint,

First. That said Court has no jurisdiction of the subject matter of said action. [16]

Second. That said complaint does not state facts sufficient to constitute a cause of action as against this demurring defendant.

G. J. LOMEN,

Attorney for Defendant Belleview.

Service admitted June 21, 1915.

WILLIAM A. GILMORE,

Atty. for Pltff.

[Endorsed]: Filed in the office of the Clerk of the District Court of Alaska, Second Division at Nome June 21, 1915. G. A. ADAMS, Clerk.

BE IT FURTHER REMEMBERED that on said 21st day of June, 1915, the defendants Sioux-Alaska Mining Company, a corporation, and Joseph Belleview, served and filed their certain written motion, which said motion was in words and figures as follows, to wit:

[Title of Court and Cause.]

Motion [to Vacate Order to Show Cause and Restraining Order].

Now comes the defendants Joseph Belleview and Sioux-Alaska Mining Company, and move the Court that the order to show cause herein and the restraining order herein be vacated; that this motion is made on behalf of said moving defendants jointly and severally on the grounds of want of jurisdiction and that the complaint states no cause of action.

This motion is based upon the records and files herein and upon the affidavit of Joseph Belleview, a copy of which is hereto [17] attached and made a part hereof.

Dated at Nome, Alaska, this 21st day of June, 1915.

G. J. LOMEN,
Attorney for Defendants Belleview and Sioux-Alaska Mining Company.

[Endorsed]: Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome, June 21, 1915. G. A. Adams, Clerk.

BE IT FURTHER REMEMBERED that on said 21st day of June, 1915, the said defendants Sioux-Alaska Mining Company and Joseph Belleview served and filed the affidavit of defendant Joseph Belleview, which said affidavit was in words and figures as follows, to wit:

[Title of Court and Cause.]

Affidavit [of Joseph Belleview].

Territory of Alaska,

Cape Nome Precinct,—ss.

Joseph Belleview being duly sworn on oath says: That he is one of the defendants above named; that on or about the 2d day of March, 1915, he bargained with one Henry M. Smith for the purchase of the dredge mentioned in the complaint in said action, and thereafter and before the commencement of this action paid to said Smith the sum of one thousand dollars as part consideration for said dredge, and made, executed and delivered to said Henry M. Smith his certain promissory notes aggregating the sum of six thousand dollars, said notes being made payable to said Henry M. Smith or order, at various times during the year 1915; that the first of said notes is due on the 15th day of August, 1915, and that said [18] other notes are due thereafter.

That said cash and notes are the consideration paid for said dredge, it being understood between said affiant and said Henry M. Smith that good title to said dredge should be delivered to affiant by the foreclosure of a mortgage then upon said dredge from W. H. Knowles and A. M. Hansen given to secure the notes of said Knowles and Hansen; that thereafter the said Knowles and Hansen mortgage was foreclosed by said Smith and said dredge is now in the possession of said affiant.

Affiant further states that during all his negotiations in the matter of the purchase of said dredge,

his dealings were exclusively made with said Henry M. Smith personally and individually, and that affiant was not in any manner informed or advised by said Smith, or otherwise, that said Smith was trustee or agent for the Sioux-Alaska Mining Company, or that said Sioux-Alaska Mining Company had any interest in said dredge or in the proceeds thereof, and that said purchase of said dredge and the delivery of said cash and notes were made in good faith and without any knowledge on part of affiant that Sioux-Alaska Mining Company had any interest in said dredge or in the proceeds thereof, and without any intent to hinder, delay or defraud any creditors of the said Sioux-Alaska Mining Company.

That said Henry M. Smith is a resident of Dell Rapids, South Dakota, and is not now within the Territory of Alaska.

That except as above, affiant is not indebted to said defendant Henry M. Smith.

JOSEPH BELLEVIEW.

Subscribed and sworn to before me this 18th day of June, 1915.

[Notarial Seal]

G. J. LOMEN,

Notary Public in and for the District of Alaska.

(My commission expires on the 27th day of June, 1917.)

[Endorsed]: Filed in the office of the Clerk of the District Court of Alaska, Second Division at Nome, June 21, 1915. G. A. Adams, Clerk, [19]

BE IT REMEMBERED that thereafter on the 21st day of June, 1915, the said matter came on for

hearing before the Court on the motion of the plaintiff for an injunction *pendente lite* and the motion of the defendants to vacate the restraining order and upon the demurrers filed by said defendants, and thereupon the plaintiff called the defendant Joseph Belleview as a witness, said witness being sworn and testified as follows:

Testimony of Joseph Belleview.

My name is Joseph Belleview. I am one of the defendants in this case. I am manager of the Hastings Creek Dredging Company. It is a corporation of South Dakota. I know the defendant H. M. Smith personally. His address is Dell Rapids, South Dakota. I made a deal with him on the 2d of March, of this year. I entered into a written agreement with him. This is the agreement we executed and delivered.

Mr. GILMORE.—I now offer the agreement in evidence.

The COURT.—It is admitted and marked Plaintiff's Exhibit "A."

(Said Exhibit being in words and figures as follows to wit:)

[Plaintiff's Exhibit "A"—Agreement.]

MEMORANDUM OF AGREEMENT made in duplicate this 2d day of March, A. D. 1915, by and between Henry M. Smith of Dell Rapids, South Dakota, party of the first part, and Joseph Belleview, of Nome, in the territory of Alaska, party of the second part, witnesseth as follows:

THAT, WHEREAS, the party of the first part is now the owner and holder of a certain chattel mort-

gage securing the payment of the sum of fifteen thousand dollars upon the terms therein mentioned, executed and delivered to him on December 15th, 1913, by W. H. Knowles and A. M. Hanson, and covering upon the following personal property described [20] in said chattel mortgage as follows, to wit: One two and one-half foot bucket gasoline or distillate dredge complete with all equipment and appurtenances belonging thereto and now therewith, and also all tools and machines and all oils and greases and supplies now therewith and all buildings, sheds and lumber now with said dredging outfit, said dredge and outfit now being situated on the Sioux-Alaska Mining Company's claims on Moss Gulch, Cape Nome Mining District, District of Alaska, and to be forthwith moved to the mortgagor's claims on Hastings Creek, being ten miles east of the City of Nome in said district aforesaid, and which said chattel mortgage was on February 24th, 1914, at 9-15 A. M. filed in the office of the recorder in and for Cape Nome precinct, District of Alaska, United States of America, as Instrument No. 60023: and,

WHEREAS, default has been made in the payment of certain of the payments to be made under the provisions of said chattel mortgage, and the said Henry M. Smith is about to commence foreclosure proceedings for the foreclosure of said mortgage as provided by law: and,

WHEREAS, if redemption is not made as provided by law by the said mortgagors, the said mortgagee will, as soon as possible, procure title to the

said mortgaged property, and in such event is desirous of selling and disposing of the same, and the party of the second part is desirous of purchasing the same:

NOW THIS INDENTURE WITNESSETH, that the said party of the first part agrees to and with the party of the second part as follows:

First. That he will prosecute with all possible dispatch with said foreclosure proceedings, and endeavor to procure title to said property so mortgaged as aforesaid.

Second. That immediately upon procuring said title he will convey to the party of the second part the said One two and one-half foot [21] bucket gasoline or distillate dredge complete with all equipments and appurtenances belonging thereto and now therewith and also all tools and machines, oils, greases and supplies now with said dredging outfit, and located on Grass Gulch, a tributary of Saunders Creek, a tributary of Hastings Creek, in Cape Nome Mining District, and in the District of Alaska aforesaid about 10 miles east of the City of Nome in said District.

In consideration of the foregoing covenants and conditions the party of the second part, his heirs or assigns, agrees to pay to the party of the first part, his heirs or assigns, the sum of Seven Thousand Dollars as follows: Five hundred dollars in cash, the receipt whereof is hereby acknowledged, five hundred dollars as soon as the party of the first part has procured title to said dredging outfit, and the conveyance aforesaid, one thousand dollars on

or before August 15th, 1915, one thousand dollars on or before September 1st, 1915, one thousand dollars on or before October 1st, 1915, one thousand five hundred dollars on or before November 1st, 1915, and one thousand dollars on or before December 1st 1915, all said payments, except the first two of five hundred dollars each, to draw interest at and after the rate of eight per cent per annum from the date of procuring title thereto and the conveyance aforesaid.

And the party of the second part, for himself, his heirs and assigns, further agrees to and with the party of the first part, his heirs and assigns, that upon the conveyance of the property aforesaid, the party of the second part will execute and deliver to the party of the first part, his promissory notes for the payments to be thereafter made as above stated, and upon the terms stated, and will at the same time execute and deliver his chattel mortgage upon the property so conveyed to secure the said payments, and each and all of them, said chattel mortgage to constitute a first lien against said personal property. [22]

And it is further agreed that if when the party of the first part commences foreclosure of said chattel mortgage, the said mortgagors therein, their heirs or assigns, should redeem said property from said property from said sale or foreclosure, that then and in that event, the party of the first part will return to the party of the second part any and all monies which he may have paid under the terms of this agreement.

IN WITNESS WHEREOF the parties to this agreement have hereunto set their hands and seals on the day and date first above written.

HENRY. M. SMITH. (Seal)

JOSEPH BELLEVIEW. (Seal)

Signed, sealed and delivered in the presence of:

C. H. SMITH.

N. C. KLEIN.

State of South Dakota,
County of Minnehaha,—ss.

On this 2d day of March, 1915, before me, the undersigned, a notary public in and for the above-named county and state, personally appeared Henry M. Smith and Joseph Bellview to me known to be the persons who are described in and who executed the foregoing instrument and acknowledged to me that they executed the same freely and to the intents and purposes therein expressed.

[Notarial Seal]

N. C. KLEIN,

Notary Public in and for Minnehaha County, South
Dakota.

State of South Dakota,
County of Minnehaha,—ss.

Henry M. Smith and Joseph Bellview being first duly sworn, each for himself, deposes and says: That they are the parties who executed the foregoing agreement or contract, and that they are absent [23] from the precinct where the property described therein is situated, being at Dell Rapids, Minnehaha County, South Dakota, and they do each for himself depose and say that said contract is executed in good faith for the purposes therein

stated, and without any design to hinder, delay or defraud creditors, or either of the parties thereto.

HENRY M. SMITH,
JOSEPH BELLVIEW.

Subscribed and sworn to before me this 2d day of March, 1915.

[Notarial Seal] N. C. KLEIN,
Notary Public in and for Minnehaha County South
Dakota.

Chicago, Illinois, March 4th, 1915.

FOR VALUE RECEIVED I hereby transfer, set over and assign to Hastings Creek Dredging Co. (a corporation) all my right, title, and interest in and to the above and foregoing contract between myself and Henry M. Smith of Dell Rapids, South Dakota.

JOSEPH BELLVIEW.

WITNESS.—(Continuing.) I paid Smith \$1000 cash. The agreement was with me personally. I was acting for the Hastings Creek Dredging Company, but took the contract in my own name. I was to pay \$6,000 more. The first payment is August 15th, 1915, and \$1,000 thereafter each month. It is my understanding the payments are to be made at the Miners and Merchants Bank in Nome. I do not know whether Mr. Smith is the trustee of the Sioux-Alaska Mining Company or not. I dealt with him irrespective of whether he was or not. I do not know whether or not Smith has been paid in full by the Sioux-Alaska Mining Company. I do not know of any other property

belonging to the Sioux-Alaska Mining Company. I did not bargain with the Sioux-Alaska Mining Company [24] for this property. I have received a bill of sale for the property but it is the understanding if I do not make the payments the property reverts back to Smith. I intend to pay the money and it doesn't make any difference to whom it is paid. I only intend to pay it once.

Cross-examination by Mr. LOMEN.

I do not know whether the notes express the payment to be made at the Miners and Merchants Bank in Nome, or not, but this is my understanding with Mr. Smith. This is my understanding by reason of conversation with him. He said he intended to send them to the bank for payment. The understanding is if I don't pay for the dredge Smith takes it back. I gave a mortgage back upon the property to Smith. The notes are secured by a mortgage. Mr. Smith is cashier of a bank at Dell Rapids. I suppose he is a man of wealth.

Redirect Examination by Mr. GILMORE.

I don't know whether he is a man of wealth or not. The amount of the mortgage is \$6,000. The mortgage has never been recorded at Nome as far as I know.

(Questions by the COURT.)

Q. Mr. Bellevue, do I understand you have already made a cash payment on this contract?

A. One thousand dollars.

Q. That has been paid over to Mr. Smith?

A. Yes, sir, \$1,000 cash.

Q. That has gone out of this place?

A. That is in his hands.

Q. Well, now, when is the first payment due?

A. August 15th for \$1,000.

And, thereafter, the matter was fully argued to the Court on the facts and the law and all of said motions and demurrers submitted [25] to the Court upon the foregoing records, files, and evidence and thereupon taken under advisement by the Court and reserved for decision.

BE IT FURTHER REMEMBERED that thereafter, and on the 3d day of July, 1915, the Court rendered and entered its decision denying plaintiff's motion for an injunction *pendente lite* and sustaining and granting the defendants' motion vacating the restraining order and sustaining the demurrers of the defendants to plaintiff's complaint, and thereupon the Court allowed the plaintiff an exception to each and all of said rulings and decisions.

BE IT FURTHER REMEMBERED that thereafter the Court made, entered and filed herein its judgment in favor of the defendants and against the plaintiff, which said judgment was in words and figures as follows, to wit:

[Title of Court and Cause]

Judgment.

The above-entitled action coming on for hearing this 3d day of July, 1915, on the complaint herein and the demurrers of the defendants Sioux-Alaska Mining Company and Joseph Bellevue, William A. Gilmore appearing for plaintiff and G. J. Lomen

appearing for said demurring defendants, and the court having on said day rendered its decision sustaining said demurrers, and the said plaintiff having refused and neglected to plead over and elected to stand on said complaint, now, therefore, it is **ORDERED AND ADJUDGED** that said action be, and the same is hereby dismissed as to said defendants Sioux-Alaska Mining Company and Joseph Bellevue, and that said defendants have judgment for their costs and disbursements [26] herein taxed at — Dollars (\$ —).

Done in open court this 10th day of July, 1915.

J. R. TUCKER,

District Judge.

[Endorsed]: Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome, July 10, 1915. G. A. Adams, Clerk, by W. C. **Mc Guire**, Deputy.

To which judgment the plaintiff then and there excepted, which said exception was allowed by the Court.

[Order Settling and Allowing Bill of Exceptions.]

The foregoing **BILL OF EXCEPTIONS** contains all the evidence introduced at the hearings therein set forth and the said bill, having been served, filed and presented for settlement by the plaintiff within the time allowed by law and extensions thereof made by orders duly entered, and being found full, true and correct, is hereby settled and allowed.

Dated at Nome, Alaska, this 26th day of July, 1915.

J. R. TUCKER,

Judge of the District Court, District of Alaska,
Second Division. [27]

The foregoing is plaintiff's proposed BILL OF EXCEPTIONS in the suit therein above entitled.

Dated at Nome, Alaska, this 23d day of July, 1915.

T. M. REED and

WILLIAM A. GILMORE,

Attorneys for Plaintiff.

Service of receipt of a copy of the within BILL OF EXCEPTIONS admitted at Nome, Alaska, this 23d day of July, 1915.

G. J. LOMEN,

Attorney for defendants Sioux-Alaska, Mining Co.
and Joseph Belleview.

Service of copy of foregoing corrected and signed bill of exceptions admitted this 26th day of July, 1915.

G. J. LOMEN,

Attorney for Defendants Sioux-Alaska M. Co. and
Joseph Belleview. [28]

[Endorsed]: No. 2606. In the District Court for the District of Alaska, Second Division. Collin Murray Plaintiff vs. Sioux-Alaska Mining Co., a cor. et al. Defendants. Bill of Exceptions. Filed in the office of the clerk of the District Court of Alaska, Second Division, at Nome. Jul. 23, 1915. G. A. Adams, Clerk. By —————, Deputy. T. M. Reed and William A. Gilmore, Attorneys at law,

Nome, Alaska, Attorneys for Plaintiff. Refiled in the office of the clerk of the District Court of Alaska, Second Division, at Nome. Jul. 26, 1915. G. A. Adams, Clerk. By —, Deputy. [29]

In the District Court for the District of Alaska, Second Division.

No. 2602.

COLLIN MURRAY,

Plaintiff,

vs.

SIoux-ALASKA MINING CO., a Corporation,
H. M. SMITH, HASTINGS CREEK
DREDGING CO. a Corporation, and
JOSEPH BELLEVIEW,

Defendants.

**Assignment of Errors on Appeal from Order
Refusing Plaintiff's Motion for an Injunction
Pendente Lite.**

Now comes the plaintiff in the above-entitled action and assigns the following error as having been committed by the Court in making and entering its order denying an injunction *pendente lite* on the 3d day of July, 1915, upon which error said plaintiff will and does rely upon his appeal from said order to the United States Circuit Court of Appeals for the 9th Circuit, to wit:

The Court erred in making and entering its certain order on the 3d day of July, 1915, denying the plaintiff's motion for an injunction *pendente*

lite for the reason that said order so entered is contrary to law.

WHEREFORE plaintiff prays that said order refusing said injunction *pendente lite* so made and entered on the 3d day of July, 1915, be reversed and that the above entitled Court be compelled to enter the said order prayed for by plaintiff.

T. M. REED and

WILLIAM A. GILMORE,

Attorneys for Plaintiff and Appellant. [30]

Service of a copy of the foregoing Assignments of Error this 26th day of July, 1915, at — M., admitted.

G. J. LOMEN,

Attorney for Defs.

[Endorsed]: No. 2602. In the District Court for the District of Alaska, Second Division. Collin Murray Plaintiff vs. Sioux-Alaska Mining Co., a cor. et al. Defendants. Assignment of Errors on Appeal from Order Refusing Injunction *Pendente Lite*. Filed in the office of the clerk of the District Court of Alaska, Second Division, at Nome. Jul. 26th, 1915. G. A. Adams, Clerk. By W. C. McG., Deputy. T. M. Reed and William A. Gilmore, Attorneys at law Nome, Alaska. Attorneys for Plaintiff. [31]

In the District Court for the District of Alaska, Second Division.

No. 2602.

COLLIN MURRAY,

Plaintiff,

vs.

SIOUX-ALASKA MINING COMPANY, a Corporation,
H. M. SMITH, HASTINGS CREEK
DREDGING CO., a Corporation, and
JOSEPH BELLEVIEW,

Defendants.

**Assignment of Error on Appeal from Order
Vacating the Plaintiff's Restraining Order.**

Now comes the plaintiff in the above-entitled action and assigns the following error as having been committed by the Court in making and entering its order granting and sustaining the defendants' motion vacating and setting aside the restraining order therefore granted in said action in favor of the plaintiff, upon which error said plaintiff will and does rely upon his appeal from said order to the United States Circuit Court of Appeals for the 9th Circuit, to wit:

The Court erred in making and entering its certain order on the 3d day of July, 1915, sustaining the defendants' motion in vacating and setting aside the temporary restraining order heretofore issued in the above-entitled action on behalf of the plaintiff for the reason that the said order so entered is contrary to law.

WHEREFORE plaintiff prays that said order so made and entered on the said 3d day of July, 1915, be reversed and that said restraining order theretofore issued restored in full force and effect.

T. M. REED and

WILLIAM A. GILMORE,

Attorneys for Plaintiff and Appellant. [32]

Service of a copy of the foregoing assignment of errors this 26th day of July, 1915, at — M., admitted.

G. J. LOMEN,

Attorney for Defs.

[Endorsed]: No. 2602. In the District Court for the District of Alaska, Second Division. Collin Murray, Plaintiff, vs. Sioux-Alaska Mining Co., a Cor., et al., Defendants. Assignment of Error on Appeal from Order Vacating Restraining Order. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jul. 26, 1915. G. A. Adams, Clerk. By W. C. McG., Deputy. T. N. Reed and William A. Gilmore, Attorneys at Law, Nome, Alaska, Attorneys for Plaintiff. [33]

*In the District Court for the District of Alaska,
Second Division.*

No. 2602.

COLLIN MURRAY,

Plaintiff,

vs.

SIOUX-ALASKA MINING CO., a Corporation,
R. M. SMITH, HASTINGS CREEK
DREDGING CO., a Corporation, and JO-
SEPH BELLEVIEW,

Defendants.

Assignment of Errors on Appeal from Final Decree.

Now comes the plaintiff in the above-entitled action and assigns the following errors as having been committed by the Court in making and entering its final decree in favor of the defendants and against the plaintiff on the 10th day of July, 1915, upon which errors said plaintiff will and does rely upon his appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, to wit:

1. The Court erred in making and entering its certain order granting the defendants' motion to vacate the temporary restraining order heretofore issued in said cause.

2. The Court erred in making and entering its order refusing and denying the plaintiff an injunction *pendente lite* in said cause.

3. The Court erred in making and entering its order sustaining the demurrer of the defendant Sioux-Alaska Mining Co., a corporation, to the plaintiff's complaint upon the 3d day of July, 1915.

4. The Court erred in making and entering its order sustaining the demurrer of the defendant Joseph Belleview to plaintiff's complaint on the 3d day of July, 1915.

5. The Court erred in making and entering said final decree in favor of the defendants and against the plaintiff on said 10 day of July, 1915. [34]

WHEREFORE plaintiff prays that said final decree so made and entered on said 10th day of July, 1915, be reversed and the trial court be remanded to restore said cause and compel the defendants to

answer the complaint of the plaintiff, and enter said injunction *pendente lite* and that the plaintiff be restored to all things which he has lost thereby.

T. M. REED and

WILLIAM A. GILMORE,

Attorneys for Plaintiff and Appellant.

Service of a copy of the foregoing Assignments of Error this 26th day of July, 1915, at — M., admitted:

G. J. LOMEN,

Attorney for Defs.

[Endorsed]: No. 2602. In the District Court for the District of Alaska, Second Division. Collin Murray, Plaintiff, vs. Sioux-Alaska Mining Co., a Cor., et al., Defendants. Assignment of Errors on Appeal from Final Decree. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jul. 26, 1915. G. A. Adams, Clerk. By W. C. McG., Deputy. T. M. Reed and William A. Gilmore, Attorneys at Law, Nome, Alaska, Attorney for Plaintiff. [35]

*In the District Court for the District of Alaska,
Second Division.*

No. 2602.

COLLIN MURRAY,

Plaintiff,

vs.

SIOUX-ALASKA MINING CO., a Corporation, H.
M. SMITH, HASTINGS CREEK DREDG-
ING CO., a Corporation, and JOSEPH
BELLEVIEW,

Defendants.

**Petition for Appeal From Order Denying Plaintiff's
Motion for an Injunction Pendente Lite.**

Comes now Collin Murray, plaintiff herein, and believing himself aggrieved by that certain interlocutory order denying and refusing an injunction *pendente lite* herein made and entered on the 3d day of July, 1915, hereby appeals from said order denying and refusing said injunction to the United States Circuit Court of Appeals for the Ninth Circuit, and hereby prays that said appeal be allowed and that an order be made fixing the amount of bond for costs and supersedeas on appeal to be given by the appellant.

Dated at Nome, Alaska, this 26th day of July, 1915.

T. M. REED, and

WILLIAM A. GILMORE,

Attorneys for Plaintiff and Appellant. [36]

Service of a copy of the foregoing Petition for Appeal this 26th day of July, 1915, at — M., admitted.

G. J. LOMEN,

Attorney for Defs.

[Endorsed]: No. 2602. In the District Court for the District of Alaska, Second Division. Collin Murray, Plaintiff, vs. Sioux-Alaska Mining Co., a Cor., at al., Defendants. Petition for Appeal from Order Denying Plaintiff's Motion for an Injunction *Pendente Lite*. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jul. 26, 1915. G. A. Adams, Clerk. By W.

C. McG., Deputy. T. M. Reed and William A. Gilmore, Attorneys at Law, Nome, Alaska, Attorneys for Plaintiff. [37]

*In the District Court for the District of Alaska,
Second Division.*

No. 2602.

COLLIN MURRAY,

Plaintiff,

vs.

SIOUX-ALASKA MINING CO., a Corporation, H.
M. SMITH, HASTINGS CREEK DREDG-
ING CO., a Corporation, and JOSEPH.
BELLEVIEW,

Defendants.

**Petition for Appeal from Order Vacating the
Temporary Restraining Order.**

Comes now Collin Murray, plaintiff herein, and believing himself aggrieved by that certain interlocutory order vacating the temporary restraining order heretofore granted, said order being made and entered herein on the 3d day of July, 1915, hereby appeals from said order vacating said temporary restraining order to the United States Circuit Court of Appeals for the Ninth Circuit, and hereby prays that said appeal be allowed and that on order be made fixing the amount of bond for costs and supersedeas on appeal to be given by the appellant.

Dated at Nome, Alaska, this 26th day of July, 1915.

T. M. REED and
WILLIAM A. GILMORE,

Attorneys for Plaintiff and Appellant. [38]

Service of a copy of the foregoing Petition for Appeal this 26th day of July, 1915, at — M., admitted.

G. J. LOMEN,
Attorney for Defs.

[Endorsed]: No. 2602. In the District Court for the District of Alaska, Second Division. Collin Murray, Plaintiff, vs. Sioux-Alaska Mining Co., a Cor., et al., Defendants. Petition for Appeal from Order Vacating the Temporary Restraining Order. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jul. 26, 1915. G. A. Adams, Clerk. By W. C. McG., Deputy. T. M. Reed and William A. Gilmore, Attorneys at Law, Nome, Alaska, Attorneys for Plaintiff. [39]

*In the District Court for the District of Alaska,
Second Division.*

No. 2602.

COLLIN MURRAY,

Plaintiff,

vs.

SIoux-ALASKA MINING CO., a Corporation, H.
M. SMITH, HASTINGS CREEK DREDG-
ING CO., a Corporation, and JOSEPH
BELLEVIEW,

Defendants.

Petition for Appeal From Final Decree.

Comes now Collin Murray, plaintiff herein, and believing himself aggrieved by that certain final decree herein made and entered on the 10th day of July, 1915, hereby appeals from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, and hereby prays that said appeal be allowed and that an order be made fixing the amount of bond for costs and supersedeas on appeal to be given by the appellant; and plaintiff further prays that the court enter its order herein granting a stay of execution and that pending and during the said final determination of said appeal that all proceedings and orders heretofore entered and made, and the property restrained, remain in *statu quo*.

Dated at Nome, Alaska, this 26th day of July, 1915.

T. M. REED and
WILLIAM A. GILMORE,

Attorneys for Plaintiff and Appellant. [40]

Service of a copy of the foregoing Petition for Appeal this 26th day of July, 1915, at — M., admitted.

G. J. LOMEN,
Attorney for Defs.

[Endorsed]: No. 2602. In the District Court for the District of Alaska, Second Division. Collin Murray, Plaintiff, vs. Sioux Alaska Mining Co., a cor., et al., Defendants. Petition for Appeal from Final Decree. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jul. 26, 1915. G. A. Adams, Clerk. By W. C. McG.,

Deputy. T. M. Reed and William A. Gilmore, Attorneys at Law, Nome, Alaska, Attorneys for Plaintiff. [41]

*In the District Court for the District of Alaska,
Second Division.*

No. 2602.

COLLIN MURRAY,

Plaintiff,

vs.

SIOUX-ALASKA MINING CO., a Corporation, H.
M. SMITH, HASTINGS CREEK DREDG-
ING CO., a Corporation, and JOSEPH
BELLEVIEW,

Defendants.

**Order Allowing Appeals and Fixing Amount of
Bond.**

This matter coming on before the Court for an order allowing an appeal from an interlocutory order vacating and setting aside a temporary restraining order in the above entitled action, and from an order refusing an injunction *pendente lite* and from a final decree heretofore entered in the above entitled action, and the Court being fully advised in the premises, it is now ORDERED that the said appeals from said order vacating the temporary restraining order and from said order refusing and denying the injunction *pendente lite* and from the said final decree as prayed for in said petitions for appeals, all and the same are each and all hereby allowed as prayed for by the plaintiff.

IT IS FURTHER ORDERED that an undertaking on appeal to act as a cost bond and stay and supersedeas bond be given by the plaintiff in the sum of One Thousand (\$1,000) Dollars to the defendants to the effect that the plaintiff shall prosecute said appeals to effect and answer for all costs and damages if he fail to make good his said appeal. [42]

IT IS FURTHER ORDERED that upon the filing of said bond the same shall act as a stay and supersedeas bond.

Done in open court at Nome, Alaska, this 26th day of July, 1915.

J. R. TUCKER,
District Judge.

[Endorsed]: No. 2602. In the District Court for the District of Alaska, Second Division. Collin Murray, Plaintiff, vs. Sioux-Alaska Mining Co., a Cor., et al., Defendants. Order Allowing Appeals and Fixing Amount of Bond. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jul. 26, 1915. G. A. Adams, Clerk. By W. C. McG., Deputy. T. M. Reed and William A. Gilmore, Attorneys at Law, Nome, Alaska, Attorneys for Plaintiff. [43]

In the District Court for the District of Alaska, Second Division.

No. 2602.

COLLIN MURRAY,

Plaintiff,

vs.

SIOUX-ALASKA MINING CO., a Corporation,
H. M. SMITH, HASTINGS CREEK
DREDGING CO., a Corporation and
JOSEPH BELLEVIEW,

Defendants.

Undertaking for Costs on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we Collin Murray as principal, and Chas. H. Milot and F. A. Daniels as sureties are held firmly bound unto Sioux-Alaska Mining Co., a corporation, H. M. Smith, Hastings Creek Dredging Co., a corporation, and Joseph Belleview, the defendants in the above-entitled action, in the sum of One Thousand (\$1,000) Dollars, lawful money of the United States of America for the payment of which well and truly to be made we bind ourselves and our, and each of our heirs, executors and administrators jointly and severally, firmly by these presents.

Sealed with our seals and dated at Nome, Alaska, this 26th day of July, 1915.

WHEREAS an order has been made and entered in the above-entitled action allowing appeals of the plaintiff to the United States Circuit Court of Appeals for the Ninth Circuit to certain interlocutory

orders made and entered on the 3d day of July, 1915, and from a final decree made and entered on the 10th day of July, 1915, and citations are about to issue citing and admonishing the said defendants to be and appear at a term of said court of appeals to be held in the City of San Francisco, State of California, and show cause why said order should not be reversed: [44]

NOW, THEREFORE, if the appellant, Collin Murray shall prosecute said appeals to effect and answer all costs and damages if he fails to sustain and make good his appeals and shall pay, or cause to be paid, to said defendants, their heirs, executors, administrators and assigns, all damages which they shall suffer by reason of said appeals, or any or either of them, if the same should be wrongful or without sufficient cause, and shall pay, or cause to be paid to the said defendants, their heirs, executors, administrators and assigns all damages which they, or either of them, shall suffer by reason of the said order of said court directing all proceedings and property restrained to remain in *statu quo*, then this obligation to be void, otherwise to remain in full force and effect.

COLLIN MURRAY, (Seal)
Principal.

By WILLIAM A. GILMORE,
His Attorney.

CHAS. H. MILOT, (Seal)
F. A. DANIELS, (Seal)
Sureties.

United States of America,
Territory of Alaska,—ss.

Chas. H. Milot and F. A. Daniels, sureties in the above undertaking, being duly sworn, each for himself and not one for the other, deposes and says:

That he is a resident of the Territory of Alaska; that he is not a counselor or attorney at law, marshal, deputy marshal, commissioner, clerk of any court, or other officer of any court; that he is worth the sum of One Thousand (\$1,000) Dollars over and above all just debts and liabilities and exclusive of property exempt from execution.

CHAS. H. MILOT,

F. A. DANIELS. [45]

Subscribed and sworn to before me this 26th day of July, 1915.

[Notarial Seal] WILLIAM A. GILMORE,
Notary Public for the Territory of Alaska, Residing
at Nome.

(My commission expires July 27th, 1915.)

The foregoing bond is hereby approved this 26th day of July, 1915, in open court.

J. R. TUCKER,

District Judge.

[Endorsed]: No. 2602. In the District Court for the District of Alaska Second Division. Collin Murray, Plaintiff vs. Sioux-Alaska Mining Co., a Cor., et al. Defendants. Undertaking for Costs on Appeal. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jul. 26, 1915. G. A. Adams, Clerk. By W. C. McG.,

Deputy. T. M. Reed and William A. Gilmore, Attorneys at Law, Nome, Alaska, Attorneys for Plaintiff. [46]

In the District Court for the District of Alaska, Second Division.

No. 2602.

COLLIN MURRAY,

Plaintiff,

vs.

SIoux-ALASKA MINING CO., a Corporation,
H. M. SMITH, HASTINGS CREEK
DREDGING CO., a Corporation and
JOSEPH BELLEVIEW,

Plaintiff,

Order Enlarging Time [60 Days] to File Record and Docket Case.

On motion of counsel for Collin Murray, appellant in the above-entitled suit, it is hereby ORDERED that the time for filing and docketing the transcript and record in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, upon appeals from two interlocutory orders and from an appeal from the final decree heretofore entered, be, and the same is hereby enlarged sixty (60) days after the return day of the citations issued on said appeals.

Done in open court at Nome, Alaska, this 26th day of July, 1915.

J. R. TUCKER,
District Judge.

Service of the foregoing order admitted at Nome, Alaska, this 26th day of July, 1915.

G. J. LOMEN,
Attorney for Defendants Sioux-Alaska, Mining Co.,
a Cor., and Joseph Bellevue. [47]

[Endorsed]: No. 2602. In the District Court for the District of Alaska, Second Division. Collin Murray, Plaintiff, et al. Defendants. Order Enlarging Time to File Record and Docket Case. Filed in the Office of the Clerk of the District Court of Alaska Second Division at Nome. Jul. 26, 1915. G. A. Adams, Clerk. By W. C. McG., Deputy. T. M. Reed and William A. Gilmore, Attorneys at Law, Nome, Alaska, Attorneys for Plaintiff. [48]

In the District Court for the District of Alaska, Second Division.

No. 2602.

COLLIN MURRAY,

Plaintiff,

vs.

SIoux-ALASKA MINING CO., a Corporation,
H. M. SMITH, HASTINGS CREEK
DREDGING CO., a Corporation and
JOSEPH BELLEVIEW,

Defendants.

United States of America,
Territory of Alaska,—ss.

**Citation on Appeal from Order Refusing an
Injunction Pendente Lite.**

The President of the United States of America, to
Sioux-Alaska Mining Co., a Corporation, H. M.
Smith, Hastings Creek Dredging Co., a Corpo-
ration, and Joseph Belleview, the Above-named
Defendants, GREETING:

You, and each of you, are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco, State of California, on the 24th day of August, 1915, pursuant to an order allowing an appeal filed in the office of the clerk of the District Court for the District of Alaska, Second Division, from a certain interlocutory order refusing an injunction *pendente lite* made and entered in said court on the 3d day of July, 1915, in that certain suit wherein you, the said Sioux-Alaska Mining Co., a corporation, H. M. Smith, Hastings Creek Dredging Co., a corporation, and Joseph Belleview are defendants, and Collin Murray is plaintiff, to show cause, if any there be, why the said order refusing on injunction *pendente lite*, as in said order allowing the appeal mentioned, should not be reversed and why speedy justice should not be done to the parties in that behalf. [49]

WITNESS the Honorable EDWARD D.
WHITE, Chief Justice of the Supreme Court of

the United States, this 26th day of July, 1915.

[Seal]

J. R. TUCKER,

Judge of the District Court for the District of
Alaska, Second Division.

Attest my hand and seal of the United States
District Court for the District of Alaska, Second Di-
vision, at the clerk's office at Nome, Alaska, this 26th
day of July, 1915.

G. A. ADAMS, Jr.,

Clerk of the United States District Court for the
District of Alaska Second Division.

Service of the foregoing citation is hereby ad-
mitted at Nome, Alaska, this 26th day of July, 1915..

G. J. LOMEN,

Attorney for Defendants Sioux-Alaska Mining Co.,
a Cor., and Joseph Belleview. [50]

*In the District Court for the District of Alaska,
Second Division.*

No. 2602.

COLLIN MURRAY,

Plaintiff,

vs.

SIoux-ALASKA MINING CO., a Corporation,
H. M. SMITH, HASTINGS CREEK
DREDGING CO., a Corporation, and
JOSEPH BELLEVIEW,

Defendants.

**Citation on Appeal from Order Vacating
Restraining Order.**

United States of America,
Territory of Alaska,—ss.

The President of the United States of America, to
Sioux-Alaska Mining Co., a Corporation, H. M.
Smith, Hastings Creek Dredging Co., a Corpo-
ration, and Joseph Belleview, the Above-named
Defendants, GREETING:

You and each of you are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held the city of San Francisco, State of California, on the 24th day of August, 1915, pursuant to an order allowing an appeal filed in the office of the clerk of the District Court for the District of Alaska, Second Division, from a certain interlocutory order vacating the temporary restraining order heretofore entered in the above-entitled action, which said interlocutory order was made and entered in said court on the 3d day of July, 1915, in that certain suit wherein you the said Sioux-Alaska Mining Company, a corporation, H. M. Smith, Hastings Creek Mining Co., a corporation, and Joseph Belleview are defendants, and Collins Murray is plaintiff, to show cause if any there be why the said order vacating the temporary restraining order, as in said order allowing the appeal [51, 52] mentioned, should not be reversed and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 26th day of July, 1915.

J. R. TUCKER,
Judge of the District Court for the District of
Alaska, Second Division.

Attest my hand and seal of the United States District Court for the District of Alaska, Second Division, at the clerk's office at Nome, Alaska, this 26th day of July, 1915.

[Seal] G. A. ADAMS,
Clerk of the United States District Court for the
District of Alaska Second Division.

Service of the foregoing citation is hereby admitted at Nome, Alaska, this 26th day of July, 1915..

G. J. LOMEN,
Attorney for Defendants Sioux-Alaska Mining Co.,
a Cor., and Joseph Belleview. [53, 54]

*In the District Court for the District of Alaska
Second Division.*

No. 2602.

COLLIN MURRAY,

Plaintiff,

vs.

SIoux-ALASKA MINING CO., a Corporation,
H. M. SMITH, HASTINGS CREEK
DREDGING CO., a Corporation, and
JOSEPH BELLEVIEW,

Defendants.

Citation on Appeal from Final Decree.

United States of America,
District of Alaska,—ss.

The President of the United States of America, to
Sioux-Alaska Mining Co., a Corporation, H. M.
Smith, Hastings Creek Dredging Co., a corpo-
ration, and Joseph Belleview, the Above-named
Defendants, GREETING:

You and each of you are hereby cited and admon-
ished to be and appear at the United States Circuit
Court of Appeals for the Ninth Circuit, to be held
at the city of San Francisco, State of California,
on the 24th day of August, 1915, pursuant to an
order allowing an appeal filed in the office of the
clerk of the District Court for the District of
Alaska, Second Division, from a certain final decree
made, filed and entered in said court on the 10th
day of July, 1915, in that certain suit wherein you
Sioux-Alaska Mining Co., a corporation, H. M. Smith,
Hastings Creek Dredging Co., a corporation, and
Joseph Belleview are defendants, and Collin Murray
is plaintiff, to show cause, if any there be, why the
said final decree rendered against the said Collin
Murray as in said order allowing the appeal men-
tioned, should not be reversed, and why speedy jus-
tice should not be done to the parties in that behalf.

[55]

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 26th day of July, 1915.

J. R. TUCKER,

Judge of the District Court for the District of Alaska, Second Division.

Attest my hand and seal of the United States District Court for the District of Alaska, Second Division, at the clerk's office at Nome, Alaska, this 26th day of July, 1915.

[Seal]

G. A. ADAMS,

Clerk of the United States District Court for the District of Alaska Second Division.

Service of the foregoing citation is hereby admitted at Nome, Alaska, this 26th day of July, 1915..

G. J. LOMEN,

Attorney for Defendants Sioux-Alaska Mining Co., and Joseph Belleview. [56]

[Certificate of Clerk U. S. District Court to
Transcript of Record.]

*In the District Court for the District of Alaska,
Second Division.*

No. 2602.

COLLIN MURRAY,

Plaintiff,

vs.

SIOUX-ALASKA MINING CO., a Corporation,
H. M. SMITH, HASTINGS CREEK
DREDGING CO. a Corporation, and
JOSEPH BELLEVIEW,

Defendants.

I, G. A. Adams, Clerk of the District Court of Alaska, Second Division, do hereby certify that the foregoing typewritten pages from 1 to 48, both inclusive, are a true and exact transcript of the court Minutes of July 3, 1915, Bill of Exceptions, Order Settling and Allowing Bill of Exceptions, Assignment of Errors on Appeal from Order Refusing Plaintiff's Motion for an Injunction *pendente lite*, Assignment of Errors on Appeal from Order Vacating the Plaintiff's Restraining Order, Assignment of Errors on Appeal from Final Decree, Petition for Appeal from Order Denying Plaintiff's Motion for an Injunction *pendente lite*, Petition for Appeal from Order Vacating the Temporary Restraining Order, Petition for Appeal from Final Decree, Order Allowing Appeals, and Fixing Amount of Bond, Undertaking for Costs on Appeal and Order Enlarging Time to File Record and Docket Case, in the case of Collin Murray, Plaintiff, vs. Sioux-Alaska Mining Co., a corporation, et al., Defendants, No. 2602-Civil, this court, and of the whole thereof, as appears from the records and files in my office at Nome, Alaska; and further certify that the original Citation on Appeal from Order Refusing on Injunction *pendente lite*, Citation on Appeal from Order Vacating Restraining Order and Citation [58] on Appeal from Final Decree in the above-entitled cause are attached to this transcript.

Cost of transcript, \$20.30, paid by William A. Gilmore, of attorneys for plaintiff.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court this 11th day of August, 1915.

[Seal]

G. A. ADAMS,
Clerk. [59]

[Endorsed]: No. 2655. United States Circuit Court of Appeals for the Ninth Circuit. Collin Murray, Appellant, vs. Sioux-Alaska Mining Company, a Corporation, H. M. Smith, Hastings Creek Dredging Company, a Corporation, and Joseph Belleview, Appellee. Transcript of Record. Upon Appeals from the United States District Court for the District of Alaska, Second Division.

Filed September 20, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit.

COLLIN MURRAY, *Appellant*,

vs.

SIoux-ALASKA MINING Co., a
corporation; H. M. SMITH;
HASTINGS CREEK DREDGING
Co., a corporation, and JO-
SEPH BELLEVIEW, *Appellees*.

No. 2655

Brief for Appellant

WILLIAM A. GILMORE,
300 Central Building,
Seattle, Washington,

JAMES E. FENTON,
New Call Building,
San Francisco, California,
Attorneys for Appellant.

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit.

COLLIN MURRAY, *Appellant*,

vs.

SIoux-ALASKA MINING Co., a
corporation; H. M. SMITH;
HASTINGS CREEK DREDGING
Co., a corporation, and JO-
SEPH BELLEVIEW, *Appellees*.

No. 2655

Brief for Appellant

STATEMENT OF THE CASE.

This is a creditor's bill brought by the appellant, Collin Murray, against the appellees. The appellant in this suit seeks to satisfy his claim for wages and money advanced out of the equitable estate of appellee, Sioux-Alaska Mining Company's interest in the purchase price of a certain dredge, the title to which heretofore stood in the name of appellee H. M. Smith as trustee for said Sioux-Alaska Mining Co.

Appellant alleges in his complaint (Tr. 3) that he performed the services and advanced the money therein described for the appellee, Sioux-Alaska Mining Co., in the years 1910, 1911 and 1912; that about the same time in 1912, the said appellee transferred the title of its dredge to appellee H. M. Smith, to secure the payment of a loan of Five Thousand Five Hundred Dollars (\$5,500.00) under an oral understanding with a right to sell or dispose of it, all of the proceeds in excess of Five Thousand Five Hundred Dollars (\$5,500.00) to belong to and to be paid by said Smith to the Sioux-Alaska Mining Co.; that appellee, Sioux-Alaska Mining Co., is wholly and totally insolvent and that it has no property real or personal and that it is impossible by any legal process to reach the trust fund sought to be enjoined and attempted to be reached by this creditor's bill; that on the 2d day of March, 1915, the appellee H. M. Smith was acting as trustee of the appellee, Sioux-Alaska Mining Co., and on said date entered into a written agreement with appellee, Belleview, to sell the said dredge for the sum of Seven Thousand Dollars (\$7,000.00) and that said Smith was about to deliver the possession and title of said dredge to the said Belleview and other appellees and about to collect the said money; that the said appellee, Sioux-Alaska Mining Co. pur-

posely, deliberately, fraudulently and designably chose and selected appellee, H. M. Smith, a non-resident of Alaska, as its trustee so as to prevent the appellant from compelling the said Smith to account for the proceeds in the District of Alaska where said dredge is located; that by reason of the fact that the said Sioux-Alaska Mining Co. had placed its personal property in the name of said H. M. Smith, it was impossible for the appellant to reach the said property by any legal process permitted or allowed by law; that it is now impossible by legal process to attach, garnish or reach the said proceeds of said sale in any other manner except by injunction of the Court in this action.

None of these facts are disputed by any of the appellees. The appellee, Sioux-Alaska Mining Co., is resisting the relief demanded by the appellant and does not deny that it is the owner of the trust fund sought to be enjoined and does not deny its insolvency or that it owes the appellant the money demanded. In other words, every fact alleged and plead by the appellant stands admitted in the record.

The appellee, Belleview, in his testimony (Tr. 24-29), admits that the sum of Six Thousand Dollars (\$6,000.00) is to be paid to appellee, H. M. Smith, or in default of said payment, that he is to re-convey the

dredge to said Smith. It is admitted and undisputed in the record (Tr. 12-14) that said H. M. Smith has received Seven Thousand Dollars (\$7,000.00) to cover the Five Thousand Five Hundred Dollars (\$5,500.00) with interest as follows: Five Thousand Dollars (\$5,000.00) from Knowles and Hansen (See letter of H. S. Sandvig, Secretary of Sioux-Alaska Mining Co., Tr. pp. 14, 15); also One Thousand Dollars (\$1,000.00) subsequently from Knowles & Hansen (Tr. 12); and also an additional One Thousand Dollars (\$1,000.00) from Belleview (Tr. 29). The letter of Secretary Sandvig (Exhibit A, Tr. 14), conclusively shows that the balance of Six Thousand Dollars sought to be reached in this action to secure the claim of the appellant is the property of appellee debtor, the Sioux-Alaska Mining Co., which said debtor was within the jurisdiction of the Court and subject to its equitable authority.

SPECIFICATIONS OF ERRORS.

1. The Court erred in making and entering its certain order granting the defendants' motion to vacate the temporary restraining order heretofore issued in said cause.

2. The Court erred in making and entering its order refusing and denying the plaintiff an injunction *pendente lite* in said cause.

3. The Court erred in making and entering its order sustaining the demurrer of the defendant Sioux-Alaska Mining Co., a corporation, to the plaintiff's complaint upon the 3d day of July, 1915.

4. The Court erred in making and entering its order sustaining the demurrer of the defendant Joseph Bellevue to plaintiff's complaint on the 3d day of July, 1915.

5. The Court erred in making and entering said final decree in favor of the defendants and against the plaintiff on said 10th day of July, 1915.

ARGUMENT.

The transcript in this case discloses three separate appeals, the first from an order vacating the temporary restraining order issued by the lower court, the second from an order denying appellant's motion for an injunction *pendente lite*, and the third from the final decree entered by the Court. The specifications of errors on all three appeals bring before this Court but one legal question for decision, to-wit: Does the appellant's

complaint state a cause of action and can the appellant maintain this equitable suit or creditor's bill and reach the fund in controversy without first reducing his claim to judgment in a court of law? All the errors assigned by appellant raise the question whether or not appellant can maintain a creditor's suit without first resorting to a legal action to prove the insolvency of the debtor, except the one based upon the Court's order sustaining appellees' demurrer. These questions can all be discussed in answering the question propounded above.

This proceeding is in the nature of a proceeding in rem.

Vol. 12, Cyc. p. 5, *Houghton vs. Alexsson*, 67 Pac. 825.

A creditor may prosecute a suit for himself alone.

12 Cyc. p. 36 and numerous cases cited.

See also 14 Century Digest "Creditor's Suit," Sec. 100 et seq.

"A bill is not demurable because brought by one creditor by himself although it mentions other creditors but contains no invitation for them to come in." *Morrison vs. Blue Star N. Co.*, 67 Pac. 344.

Where it is shown that judgment and execution would be fruitless and involve useless and unnecessary expense, a creditor might maintain a creditor's bill to

reach equitable interests of his debtor without first obtaining a judgment at law.

12 Cyc. p. 11 and numerous cases cited in foot note 25.

So it has been held that where the fund sought to be reached is beyond legal processes, the debtor is insolvent and the claim of the plaintiff is undisputed, a creditor's bill might be maintained, although no judgment was first had suing the debtor.

12 Cyc. p. 11 and cases cited in foot note 26.

Compiled Laws of Alaska, Section 833, p. 375 provides as follows:

"The distinction between actions at law and suits in equity, and the forms of all such actions and suits, are abolished, and there shall be but one form of action for the enforcement or protection of rights and the redress or prevention of private wrongs, which is denominated a civil action."

See also citations following said section in Compiled Laws of Alaska.

The cases read and relied upon by counsel for the defendants, were decisions that originated in States that are not governed by any such an act as the one above quoted, and in such states the distinction between actions at law and equitable actions has not been abolished.

In those States where a similar statutory provision is found to our own, the decisions are quite uniform.

See *Hurlbutt vs. Saw Co.*, 28 Pac. 795 (93 Cal. 55).

The demurrers should have been overruled and the appellees compelled to answer and go to trial.

"Although an action may be commenced as an equitable one, yet, where there is nothing to give a Court equity jurisdiction thereof, the Court has authority to permit it to be tried as an action at law, if the defendant is not thereby prevented from having a fair trial." *Surber vs. Kittenger*, 6 Wash. 240 (33 Pac. 507).

This very provision has been construed by this Court in the case of *Madden vs. McKenzie*, 114 Fed. 65, wherein the Circuit Court in a unanimous decision after quoting Section 833 of the Compiled Laws above set forth, says:

"Such a statute, while it does not abolish all distinction between law and equity as to procedure, has the effect to render inapplicable to any complaint the objection that the plaintiff has a plain, speedy and adequate remedy at law."

Appellant was entitled to the equitable relief demanded.

See *Tally vs. Curtain*, 54 Fed. p. 44

This was a suit wherein a creditor's bill was filed to set aside an assignment of the debtor's property for the benefit of the creditors.

The Court in this case did not insist upon the recovery of a judgment as prerequisite to setting aside a fraudulent deed of assignment, because the recovery of a judgment and a fruitless execution, would have been vain, as the deed in question not only professes to, but did in express words convey and assign all the debtor's property and rights of property to a trustee, and stripped him irrevocably of all his assets.

This case completely distinguishes the case of *Scott vs. Neely*, 140 U. S. 106, relied upon by counsel for appellees, wherein they contend that they are entitled to trial by jury, under the Seventh Amendment of the Constitution of the United States.

The appellee Sioux-Alaska Mining Company by assigning its property and placing it in the name of H. M. Smith, equitably waived its right to a trial by jury, by compelling the appellant in this case to resort to an equitable remedy.

We further cite the Court to the case of *Cons. T. L. Co. vs. Kansas City*, 45 Fed. 16.

In this latter case, the Court on page 16 says:

"It is finally insisted by counsel representing some of the respondents that the action must fail for the reason that complainants are not judgment debtors, and there has been no return of nulla bona on execution. Our view of this matter is expressed by Mr. Justice Strong in *Case vs. Beauregard*, 101 U. S. 688-691. Looking to the foundation upon which the rule contended for rests, is ought not to apply where judgment and execution would be fruitless."

The Court then quotes the opinion of the Court in the *Beauregard* case, *Supra*, as follows:

"When the debtor's estate is a mere equitable one, which cannot be reached by any proceeding at law, there is no reason for requiring attempts to reach it by legal process. * * * It may be said that, whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting legal processes or remedies. Indeed, in those cases in which it has been held that obtaining a judgment and issuing an execution is necessary before a Court of equity can be asked to set aside fraudulent dispositions of the debtor's property the reason given is that a general creditor has no lien. And when such bills have been sustained without a judgment at law, it has been to enable the creditor to obtain a lien, either by judgment or execution. But when the bill asserts a lien or a trust, and shows that it can be made available only by the aid of a chancellor, it obviously makes a case for his interference."

See also Vol. 5 Ency. of Pleadings and Practice, p. 520.

"But there are other authorities of equal respectability, if not as numerous, denying the necessity for a judgment when the debtor is insolvent, on the ground

that the creditor should not be required to prosecute an action at law, knowing beforehand that he will not be able to collect his judgment by the ordinary processes, and it is believed that the Supreme Court of the United States has leaned towards this view."

See numerous cases cited in Foot Note 1, p. 520.

In conclusion we submit that the appellant in this case is entitled to have said decree reversed and the demurrer overruled and that he is entitled to equitable relief of the Court, and that he is entitled to an injunction *pendente lite*, enjoining the appellees Bellevue and the Hastings Creek Dredging Company from paying, or causing to be paid to the appellee H. M. Smith or the Sioux-Alaska Mining Co. or any one in their behalf, said fund, and enjoining said Bellevue and said Hastings Creek Dredging Co., if they fail to carry out their agreement with said H. M. Smith, from reconveying the said dredge to said Smith or the Sioux-Alaska Mining Co. until the further and final order of the Court.

In closing we call the Court's attention to the fact that the only party objecting now to this relief is the appellee debtor, the Sioux-Alaska Mining Co., which said company certainly ought not to have an equitable standing in court, as it certainly does not come into court with clean hands. It ought to be very evident to

the Court that the Sioux-Alaska Mining Co., the debtor of the appellant, is only in court trying to secure equitable rights for appellee H. M. Smith for the use and benefit of itself. We submit the decree of the lower Court should be reversed and said cause remanded for trial.

Respectfully submitted,

WILLIAM A. GILMORE

and JAMES E. FENTON,

Attorneys for Appellant.

No. 2655.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

COLLIN MURRAY,

Appellant,

vs.

SIOUX-ALASKA MINING COMPANY, a Corporation, H.
M. SMITH, HASTINGS CREEK DREDGING CO., a
Corporation, and JOSEPH BELLEVIEW,

Appellees.

BRIEF FOR APPELLEES SIOUX-ALASKA
MINING COMPANY AND JOSEPH
BELLEVIEW.

G. J. LOMEN,

Attorney for Appellees Sioux-Alaska Mining Co.
and Joseph Bellevieu.

Filed this.....day of September, 1916.

Filed

SEP 6 - 1916

E. D. Monckton
Clerk.

By.....Deputy Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

COLLIN MURRAY,

Appellant,

vs.

SIOUX-ALASKA MINING COM-
PANY, a corporation, H. M. SMITH,
HASTINGS CREEK DREDGING
CO., a corporation, and JOSEPH
BELLEVIEW,

Appellees.

No. 2655

BRIEF FOR APPELLEES, SIOUX-ALASKA MINING
COMPANY AND JOSEPH BELLEVIEW.

ARGUMENT.

Appellant asserts that his complaint is a creditor's bill. He appears to be a simple, contract creditor. He alleges no lien or trust. He seeks to enjoin the appellee, Belleview, alleged to be a debtor of the defendant Smith, a non-resident debtor of the appellee Sioux-Alaska Mining Company, an alleged debtor of the appellant, from paying his legal debts to said Smith. There is no pretense that Belleview is not a bona fide purchaser for value. In effect the action is

brought, not to cancel the agreement of purchase between Smith and Belleview, but, ratifying same, to follow the proceeds of the property sold to Belleview. Without a lien or trust in favor of appellant being shown, this cannot be done, even were the action against Smith, and, with or without a lien or trust, the action does not lie against the appellee Belleview, an innocent purchaser for value.

In the federal courts a creditor's bill does not lie until judgment at law against the principal debtor has been obtained and an execution returned *nulla bona*.

Scott v. Nealy, 140 U. S., 106; 11 S. Ct., 712;
Cates v. Allan, 149 U. S., 451; 13 S. Ct., 883;
Hollins v. Brierfield Coal & Iron Co., 150 U.
 S., 371; 14 S. Ct., 127.

The federal rule must be followed in this case. The only federal cases cited by appellant are *Madden v. McKenzie*, 114 Fed., 65, which is not in point; *Tally v. Curtain*, 55 Fed., 44, where complainants had an interest in the property under a deed and the trustee was in court; and *Consolidated T. & L. Co. v. Kansas City*, 45 Fed., 16, where a creditor's bill was filed to set aside a deed of trust, and where the necessary parties were in court.

Nowhere can a case be found where the court has enjoined a *debtor* of a *debtor* of a *debtor* from paying his legal obligation.

12 Cyc., 28, note 35;

Jones v. Huntington, 9 Mo., 249.

Especially must this be so where the court has no jurisdiction of the second debtor. There is a *missing link*.

This action was not brought on behalf of appellant and *other creditors*. This was also fatal to the bill.

Pullman v. Stebbins, 51 Fed., 10.

If appellant should prevail in this action we can well see how the appellee Bellevue might lose the benefit of his bargain however innocent he might be. He at least comes into court with "clean hands." Appellant facetiously claims that the appellee Sioux-Alaska Mining Company does not come into court with "clean hands." Said company did not come into court voluntarily, but was brought into court *by appellant*. We observe in passing, that said company has been *adjudicated a bankrupt* in the United States District Court, at Sioux Falls, South Dakota.

Respectfully submitted.

G. J. LOMEN,

Attorney for Appellees Sioux-Alaska Mining
Co. and Joseph Bellevue.

No. 2656

16

United States
Circuit Court of Appeals
For the Ninth Circuit.

NATIONAL PACIFIC OIL COMPANY, a Corporation,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Northern Division.

Filed

NOV 1 - 1915

F. D. Monckton,

Clerk

No. 2656

United States
Circuit Court of Appeals

For the Ninth Circuit.

NATIONAL PACIFIC OIL COMPANY, a Corporation,

Appellant,

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Transcript of Record.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

For Appellant:

A. L. WEIL, Esq., 1206 Alaska Commercial Building, San Francisco, California.

For Appellees:

THOMAS W. GREGORY, Esq., Attorney-General of the United States, Washington, D. C.;

ALBERT SCHOONOVER, Esq., U. S. Attorney, Los Angeles, California; and

E. J. JUSTICE, Esq., Special Assistant to the Attorney-General, Postoffice Building, San Francisco, California. [3*]

[Citation on Appeal (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof; pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Southern District of California, Northern Division, Ninth Circuit, wherein the National Pacific Oil Company is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

*Page-number appearing at foot of page of certified Transcript of Record.

WITNESS, the Honorable M. T. DOOLING,
United States District Judge for the Northern Dis-
trict of California, this 21st day of May, A. D. 1915.

M. T. DOOLING,

United States District Judge. [4]

Service accepted this 26 day of May, 1915.

E. J. JUSTICE.

P.

United States of America,—ss.

On this 26th day of May, in the year of our Lord
one thousand nine hundred and fifteen, personally
appeared before me, Flora Hall, Notary Public in
and for the City and County of San Francisco, the
subscriber, Charles M. Weile, and makes oath that
he delivered a true copy of the within citation to
United States of America, delivered to E. J. Justice,
Solicitor for the within named plaintiff.

CHARLES M. WEILE.

Subscribed and sworn to before me at San Fran-
cisco, Cal., this 26th day of May, A. D. 1915.

[Seal]

FLORA HALL,

Notary Public in and for the City and County of San
Francisco, State of California.

[Endorsed]: No. A-2.—In Equity. United States
District Court, for the Southern District of Cali-
fornia, Northern Division, Ninth Circuit. National
Pacific Oil Company, Appellant, vs. The United
States of America. Citation on Appeal. Filed Jun.
1, 1915. Wm. M. Van Dyke, Clerk. By Chas. N.
Williams, Deputy Clerk.

*In the District Court of the United States, in and for
the Southern District of California, Northern
Division.*

No. A-2—EQUITY.

THE UNITED STATES OF AMERICA,

Plaintiff,

versus

CONSOLIDATED MIDWAY OIL COMPANY,
National Pacific Oil Company, Midnight Oil
Company, Daybreak Oil Company, Panama
Oil Company, France Wellman Oil Company,
Standard Oil Company, Thirty Thirty-Two
Land Company, General Petroleum Company,
Maricopa Consolidated Oil Company, General
Pipe Line Company of California, Title In-
surance and Trust Company, Sesame Oil Com-
pany, Parker Barrett, Oma Barrett, Julius
Fried, J. M. Dunn, L. E. Doan, George E.
Whitaker, M. J. Laymance, Mary F. Francis,
A. L. Weil, Florence G. Weil, J. M. Danziger,
Daisy C. Danziger, M. P. Waite, Anna W.
Mary Waite, Charles A. Son, David S. Bach-
man and A. B. Coulson,

Defendants. [5]

No. A-2—EQUITY.

*In the District Court of the United States, Southern
District of California, Northern Division, Ninth
Circuit.*

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

CONSOLIDATED MIDWAY OIL COMPANY,
NATIONAL PACIFIC OIL COMPANY
et al.,

Defendants.

Bill of Complaint.GEORGE W. WICKERSHAM,
Attorney-General of the United States.A. I. McCORMICK,
United States Attorney.

B. D. TOWNSEND,

Special Assistant to the Attorney-General.

Filed Feb. 18, 1913. Wm. M. Van Dyke, Clerk.
By Chas. N. Williams, Deputy Clerk. [6]

*In the District Court of the United States, Southern
District of California, Northern Division, Ninth
Circuit.*

THE UNITED STATES OF AMERICA,

Plaintiff,

versus

CONSOLIDATED MIDWAY OIL COMPANY,
National Pacific Oil Company, Midnight Oil
Company, Daybreak Oil Company, Panama

Oil Company, France Wellman Oil Company, Standard Oil Company, Thirty Thirty-Two Land Company, General Petroleum Company, Maricopa Consolidated Oil Company, General Pipe Line Company of California, Title Insurance and Trust Company, Sesame Oil Company, Parker Barrett, Oma Barrett, Julius Fried, J. M. Dunn, L. E. Doan, George E. Whitaker, M. J. Laymance, Mary F. Francis, A. L. Weil, Florence G. Weil, J. M. Danziger, Daisy C. Danziger, M. P. Waite, Anna W. Mary Waite, Charles A. Son, David S. Bachman and A. B. Coulson,

Defendants.

To the Judges of the District Court of the United States for the Southern District of California, Sitting Within and for the Northern Division of Said District;

The United States of America, by George W. Wickersham, its Attorney-General, presents this, his Bill in Equity, against Consolidated Midway Oil Company, National Pacific Oil Company, Midnight Oil Company, Daybreak Oil Company, Panama Oil Company, France Wellman Oil Company, Standard Oil Company, Thirty Thirty-Two Land Company, General Petroleum Company, Maricopa Consolidated [7] Oil Company, General Pipe Line Company of California, Title Insurance and Trust Company, Sesame Oil Company, Parker Barrett, Oma Barrett, Julius Fried, J. M. Dunn, L. E. Doan, George E. Whitaker, M. J. Laymance, Mary F. Francis, A. L. Weil, Florence G. Weil, J. M. Danziger,

Daisy C. Danziger, M. P. Waite, Anna W. Mary Waite, Charles A. Son, David S. Bachman and A. B. Coulson (citizens and residents, respectively, as stated in the next succeeding paragraph of this bill), and in that behalf the plaintiff complains and alleges:

I.

Each of the defendants Consolidated Midway Oil Company, France Wellman Oil Company and Maricopa Consolidated Oil Company now is, and at all the times hereinafter mentioned as to it was, a corporation organized under the laws of the former territory, now State, of Arizona, and is a resident and citizen of said State.

Each of the defendants, National Pacific Oil Company, Midnight Oil Company, Daybreak Oil Company, Panama Oil Company, Standard Oil Company, Thirty Thirty-Two Land Company, General Petroleum Company, General Pipe Line Company of California, Title Insurance and Trust Company and Sesame Oil Company now is, and at all the times hereinafter mentioned as to it was, a corporation organized under the laws of the State of California, and is a resident and citizen of said State.

Each of the defendants, Parker Barrett, Oma Barrett, Julius Fried, J. M. Dunn, L. E. Doan, George E. Whitaker, M. J. Laymance, Mary F. Francis, A. L. Weil, Florence G. Weil, J. M. Danziger, Daisy C. Danziger, M. P. Waite, Anna W. Mary Waite, Charles A. Son, David S. Bachman and A. B. Coulson, is a resident and citizen of the State of California. The defendant, Mary F. Francis now is, at all times since January 16, 1909, has been, a widow.

The defendant, A. L. Weil, is the husband of the defendant Florence G. Weil. The defendant, J. M. Danziger, [8] is the husband of the defendant Daisy C. Danziger. The defendant, M. P. Waite, is the husband of the defendant Anna W. Mary Waite.

The defendants A. L. Weil, Florence G. Weil, J. M. Danziger, Daisy C. Danziger, N. P. Waite, Anna W. Mary Waite, Charles A. Son and David S. Bachman are sued in their own right, respectively, and also as trustees under a certain purported trust deed hereinafter mentioned.

The defendant Title Insurance & Trust Company is sued in its own right, and also as trustee, under a certain purported mortgage deed hereinafter mentioned.

Certain of the defendants are described herein otherwise than by Christian name for the reason that the Christian name of each of said defendants is unknown to the plaintiff.

II.

The plaintiff now is, and ever since the Treaty of Guadalupe Hidalgo has been, the owner and entitled the the immediate and exclusive possession and enjoyment of all of the land next hereinafter described, and of all mineral oil, petroleum, gas and other minerals therein contained, said land being particularly described as follows, to wit: All of fractional section thirty, township twelve north, range twenty-three west, San Bernardino base and meridian, situated in Kern County, State of California. All of said land at all said times has been, and now is, a part of the public domain of the United States, ex-

cept as withdrawn and reserved from entry as hereinafter alleged. All of said land now is, and at all times has been, oil-bearing land, containing rich deposits of petroleum or mineral oil and gas in commercially paying quantities, and at all times has been, and now is, chiefly valuable for the petroleum or mineral oil and gas deposited therein, and has never contained any minerals other than petroleum or mineral oil and gas. [9]

On September 14, 1908, the Secretary of the Interior of the United States of America, duly and regularly withdrew and reserved the land hereinbefore described (together with other contiguous public lands) from settlement, entry or purchase under the agricultural land laws of the United States for the purpose of examining and classifying said lands.

On June 9, 1909, the land hereinbefore described (together with other contiguous public lands) was duly and regularly classified by the Secretary of the Interior as petroleum—or oil-bearing lands, which said order of classification ever since last-named date has been, and still is, in full force and effect.

On September 27, 1909, the President of the United States, acting by and through the Secretary of the Interior, and under the authority legally invested in him so to do, duly and regularly withdrew and reserved all of the land hereinbefore particularly described (together with other contiguous public lands) from mineral exploration, and from all forms of location, settlement, selection, filing, entry or disposal under the mineral or nonmineral public land laws of

the United States; and since said last-named date none of said land has been subject to exploration for minerals or to the initiation of any right under any of the public land laws of the United States.

On July 2, 1910, the President of the United States, under the authority legally invested in him so to do, and especially by virtue of the provisions of the Act of Congress approved June 25, 1910, entitled "An Act to Authorize the President of the United States to Make Withdrawal of Public Lands in Certain Cases" (36 Stat. 847), duly and regularly ratified, affirmed and continued in full force and effect said order of withdrawal [10] and reservation of September 27, 1909, and did further withdraw and reserve all of said land from mineral exploration and from all forms of location, settlement, selection, filing, entry or disposal under the mineral or nonmineral public land laws of the United States, subject only to the provisions of said Act of Congress. Each of said orders of withdrawal and reservation, ever since the dates thereof, respectively, has been, and now is, in full force and effect.

Notwithstanding the premises, and in violation of the proprietary and other rights of this plaintiff, and in violation of the laws of the United States and the lawful orders and proclamations of the President of the United States, the defendants herein, subsequent to January 1, 1910, entered upon the land hereinbefore particularly described, pretended to acquire, and now assert, mineral rights therein, or some part thereof, and have committed and are now committing trespass and waste thereupon, as more particularly

hereinafter set forth.

IV.

On March 1, 1910, the defendant Consolidated Midway Oil Company wrongfully and unlawfully and in violation of the proprietary and other rights of this plaintiff, entered upon the land hereinbefore described, and thereafter drilled and caused to be drilled an oil well thereupon, and thereafter operated said oil well, and extracted from said land and appropriated to its use large quantities of petroleum or mineral oil and gas.

During the month of December, 1910, said defendant Consolidated Midway Oil Company surrendered possession of said oil well to the defendant National Pacific Oil Company, and ever since said last-named date the defendant National Pacific Oil Company wrongfully and unlawfully and in violation of the proprietary and other rights of this plaintiff, has operated and still is operating said oil well, and has drilled and caused to [11] be drilled other oil wells upon said land, and has operated and still is operating said last-mentioned oil wells, and has extracted from said land and appropriated to its use large quantities of petroleum or mineral oil and gas.

Subsequent to July 5, 1910, the defendant Midnight Oil Company wrongfully and unlawfully and in violation of the proprietary and other rights of this plaintiff, entered upon said land, and thereafter drilled and caused to be drilled an oil well or oil wells thereupon, and thereafter has operated and still is operating said oil well or oil wells, and has extracted from said land and appropriated to its use large

quantities of petroleum or mineral oil and gas.

Subsequent to July 5, 1910, the defendant Day-break Oil Company wrongfully and unlawfully, and in violation of the proprietary and other rights of this plaintiff, entered upon said land, and thereafter drilled and caused to be drilled an oil well or oil wells thereupon, and thereafter has operated and still is operating said oil well or oil wells, and has extracted from said land and appropriated to its use large quantities of petroleum or mineral oil and gas.

Subsequent to July 5, 1910, defendant Panama Oil Company wrongfully and unlawfully, and in violation of the proprietary and other rights of this plaintiff, entered upon said land, and thereafter drilled and caused to be drilled an oil well or oil wells thereupon, and thereafter has operated and still is operating said oil well or oil wells, and has extracted from said land and appropriated to its use large quantities of petroleum or mineral oil and gas.

The five defendants last hereinbefore mentioned are hereinafter described collectively as "operators."

Said operators entered upon said land, drilled oil wells thereupon, and extracted and are extracting petroleum or mineral [12] oil and gas therefrom as aforesaid, claiming the right so to do under and by virtue of a certain pretended notice of mining location purporting to have been signed by the defendants Parker Barrett, Oma Barrett, J. M. Dunn and others, which was recorded on July 27, 1908, in book 31 of Mining Records, at page 156, in the office of the County Recorder of Kern County, California, by which said notice of mining location an interest

in all of said land and the right to extract minerals therefrom were asserted under the placer mining laws of the United States, and said operators claim by right of succession from said original pretended locators, by virtue of some pretended conveyances, leases or assignments, and not otherwise.

Said pretended notice of mining location will hereinafter be mentioned as the "D and B Placer Mining Location," and said pretended locators as the "D and B Locators."

The defendants Parker Barrett, Oma Barrett, Julius Fried and J. M. Dunn claim some right, title or interest in said land and the right to extract minerals therefrom under said "D and B Placer Mining Location," either as original locators thereof, or by virtue of some pretended conveyances, leases or assignments from certain of the aforesaid "D and B Locators." Each of the defendants France Wellman Oil Company, L. E. Doan and George E. Whitaker, claims some right, title or interest in or to said land, and the right to extract minerals therefrom, by virtue of some pretended conveyances, leases or assignments from said "D and B Locators" or their pretended successors in interest.

The defendant General Pipe Line Company of California claims some right, title or interest in or to said land by virtue of a certain pretended conveyance by one J. M. McLeod to one C. W. Waller, dated January 24, 1910, purporting to convey to said C. W. Waller the right to construct, maintain [13] and operate pipes and conduits for the transportation and distribution of petroleum and other mineral

oils, gas and water, and to construct, maintain and operate telegraph and telephone lines over, through, under and along said land or some part thereof; also by virtue of a certain pretended conveyance dated April 19, 1912, purporting to be executed by said C. W. Waller and Rose A. Waller, his wife, wherein and whereby said C. W. Waller and Rose A. Waller purported to convey unto the said General Pipe Line Company of California all of the alleged rights of said C. W. Waller under the aforesaid purported conveyance executed by said J. M. McLeod to said C. W. Waller.

The defendant Title Insurance and Trust Company claims some right, title or interest in or to, or lien upon, said land, by virtue of a certain instrument in writing dated March 7, 1911, purporting to have been executed by the defendant Consolidated Midway Oil Company, wherein and whereby the defendant Consolidated Midway Oil Company purported to mortgage to said Title Insurance and Trust Company certain of the aforesaid land (together with other land) to secure the payment of a certain indebtedness purported to be owing by said defendant Consolidated Midway Oil Company to the defendant A. B. Coulson.

The defendant A. B. Coulson claims some right, title or interest in or to, or lien upon, said land, by virtue of the instrument last herein described.

The defendant Sesame Oil Company claims some right, title, or interest in or to, or lien upon, said land or some part thereof, by virtue of a certain pretended attachment lien asserted under a certain writ of at-

tachment issued out of the Superior Court of the city and County of San Francisco, State of California, in a certain suit instituted by said defendant Sesame Oil Company against the defendant Consolidated Midway Oil Company, pursuant to a certain notice of attachment recorded [14] on May 5, 1911, in book 4 of Attachments, at page 489, in the records of Kern County, State of California.

V.

Each of the defendants Thirty Thirty-Two Land Company, General Petroleum Company, Maricopa Consolidated Oil Company, and Mary F. Francis claims some right, title or interest in or to said land or some part thereof by virtue of a certain pretended notice of mining location purporting to have been signed by one John Conley, one Josephine Conley, one A. E. Brown, one James Hawley, one Ira P. Goodwin, and one L. P. Brown, bearing date January 1, 1906, and recorded January 2, 1906, in book 42 of Mining Records, at page 111, in the records of Kern County, State of California. Said pretended notice of mining location will hereinafter be mentioned as the "Headlight Placer Mining Location."

Each of the defendants A. L. Weil, Florence G. Weil, J. M. Danziger, Daisy C. Danziger, M. P. Waite, Anna W. Mary Waite, Charles A. Son and David S. Bachman claims some right, title or interest in or to said land or some part thereof, or lien thereupon, individually and also as trustee for the defendant Thirty Thirty-Two Land Company, under some pretended conveyance or deed of trust, further particulars whereof are unknown to the plaintiff.

VI.

No work of exploration or development for the discovery of petroleum, mineral oil or gas, or any other mineral, was ever commenced or prosecuted, in good faith or otherwise, or at all, upon any part of said land under either of said placer mining claims hereinbefore described, or otherwise, by or on behalf of said "D and B Locators" or said "Headlight Locators," or either or any of them, or any of their alleged successors in interest, or any of the defendants herein, or otherwise, or at [15] all, prior to January 1, 1910.

No discovery of any mineral (other than petroleum or mineral oil and gas) has ever been made in or upon any part of said land. Neither petroleum, mineral oil nor gas was ever discovered in or upon any part of said land prior to June 29, 1910; and because of the premises of this bill, no valid discovery of petroleum, mineral oil or gas (within the meaning of the mineral land laws of the United States) was ever made in or upon any part of said land.

No valid location or entry of or claim to said land, or any part thereof, under any public land law of the United States, or otherwise, was ever made or acquired by said "D and B Locators," said "Headlight Locators," or either or any of them, or by any of their alleged successors in interest, or by the defendants herein, or either or any of them, or by any person or persons, corporation or corporations, or at all.

Except as set forth in this bill, no claim of any right, title or interest in or to, or lien upon, any of

said land, or to the use or possession thereof, or to any of the minerals therein contained, is asserted by or on behalf of any person or persons, corporation or corporations, or at all.

Each and all of the claims asserted by the defendants herein, and each of them, in or to said land, or any part thereof, or the use or possession thereof, or the minerals deposited therein, are based solely upon the pretended placer mining locations hereinbefore described.

Prior to January 1, 1910, no person or association or corporation was a *bona fide* occupant or claimant of any part of said land, engaged in the diligent or other prosecution of work leading to the discovery of oil or gas, or any other mineral.

VII.

Each of the defendants described in paragraph IV hereof [16] as "operators" now continue, and threaten and unless restrained therefrom will continue, to operate the aforesaid oil wells and extract from said land petroleum or mineral oil and gas in large quantities, and will drill other oil wells upon said land and operate the same and extract from said land petroleum or mineral oil and gas, and otherwise commit trespass and waste upon said land, to the great and irreparable injury of this plaintiff.

VIII.

The plaintiff does not know the exact quantity of petroleum, mineral oil or gas extracted from said land and appropriated by the defendants hereinbefore described as "operators," or any of them, as aforesaid, and has no means of ascertaining the true

facts in the premises except from the defendants; therefor a full discovery in the premises is sought herein.

Plaintiff is informed and believes, and therefore alleges, that a large part, if not all, of the petroleum or mineral oil and gas extracted from said land and appropriated by said "operators" as aforesaid, was by said "operators" respectively sold to the defendant Standard Oil Company and was by said defendant Standard Oil Company appropriated to its own use and benefit. The plaintiff does not know the exact quantity of petroleum or mineral oil and gas sold to and appropriated by the defendant Standard Oil Company as aforesaid, nor the price paid therefor, and has no means of ascertaining the true facts in the premises except from the defendants herein; therefore a full discovery in the premises is sought herein.

The plaintiff does not know the exact quantity of petroleum or mineral oil and gas, if any, sold by said "operators," or any of them, to parties other than the defendant Standard Oil Company, or the name or names of said purchaser or purchasers, [17] if any, or the price received therefor, and has no means of ascertaining the true facts in the premises except from the defendants herein; therefore a full discovery in the premises is sought herein.

IX.

Each of the defendants named in paragraph VI hereof, claiming under said "Headlight Placer Mining Location" as aforesaid, either directly or through some agent or attorney, wrongfully and unlawfully

and in violation of the proprietary and other rights of this plaintiff, heretofore entered into possession of some part of said land, and now continues, and threatens and unless restrained therefrom will continue, to hold possession thereof, and further threatens to, and unless restrained therefrom will, drill oil wells thereupon and extract petroleum or mineral oil and gas therefrom, and otherwise commit trespass and waste thereupon, to the great and irreparable injury of this plaintiff.

X.

The defendant M. J. Laymance claims some right, title or interest in or to, or lien upon, said land, or some part thereof, or the right to extract minerals therefrom. The plaintiff does not know the nature or the alleged basis of said claim of interest, and has no means of ascertaining same except from said defendant; but in that behalf plaintiff alleges that said defendant has no right, title or interest in or to, or lien upon, said land or any part thereof, or any right to extract any of the minerals therefrom.

XI.

Except as in this bill stated, plaintiff has no knowledge or information concerning the exact nature or alleged basis of any of the claims asserted by the defendants herein, or any of them; and, therefore, leaves said defendants to set forth their respective claims of interest. [18]

In that behalf plaintiff alleges that, because of the premises of this bill, none of the defendants have or ever had any right, title or interest in or to, or lien upon, said land, or any part thereof, or any right or

interest in or to the petroleum or mineral oil or gas deposited therein, or any right to extract petroleum or mineral oil or gas, or any other mineral from said land, or any part thereof. On the contrary, each of said petended placer mining locations is, and at all times has been, void and of no effect; and no rights whatever were ever acquired thereunder; and each and all of the aforesaid acts of the defendants herein in asserting an interest in or to said land, and in entering upon and taking and holding possession thereof, and in drilling and constructing oil wells thereupon, and in extracting, using and appropriating the petroleum or mineral oil and gas deposited therein, were and are in violation of the laws of the United States and the aforesaid orders withdrawing and reserving said land, and all of said acts were and are in violation of the proprietary and other rights of this plaintiff.

XII.

The present value of the land hereinbefore described exceeds five hundred thousand (500,000) dollars.

In consideration whereof, and inasmuch as plaintiff is without full and adequate remedy in the premises, save in a court of equity, where matters of this nature are properly cognizable and relievable, plaintiff prays:

1. That said defendants, and each of them, may be required to make full, true and direct answer respectively to all and singular the matters and things hereinbefore stated and [19] charged and to fully disclose and state their claims to said land herein-

before described, and to any and to all parts thereof, as fully and particularly as if they had been particularly interrogated thereunto, but not under oath, answer under oath being hereby expressly waived;

2. That the said land may be declared by this court to have been at all times from and after the 27th day of September, 1909, lawfully withdrawn from mineral exploration and from all forms of location, settlement, selection, filing, entry or disposal under the mineral or nonmineral public land laws of the United States:

3. That said defendants, and each of them, may be adjudged and decreed to have no estate, right, title, interest or claim in or to said land or any part thereof, or in or to any mineral or minerals or mineral deposits contained in or under said land or any part thereof; and that all and singular of said land, together with all of the minerals and mineral deposits, including mineral oil, petroleum and gas therein or thereunder contained, may be adjudged and decreed to be the perfect property of this plaintiff, free and clear of the claims of said defendants, and each and every one of them;

4. That each and all of the defendants herein, their officers, agents, servants and attorneys, during the progress of this suit, and thereafter, finally and perpetually, may be enjoined from asserting or claiming any right, title, interest, claim or lien in or to the said land or any part thereof, or in or to any of the minerals, or mineral deposits therein, or thereunder contained; and that each and all of the defendants herein, their officers, agents, servants and attor-

neys, during the progress of this suit, and thereafter, finally and perpetually may be enjoined from going upon any part or portion of said land, and from in any manner using any of said land and [20] premises and from in any manner extracting, removing or using any of the minerals deposited in or under said land and premises, or any part or portion thereof, or any of the other natural products thereof, and from in any manner committing any trespass or waste upon any of said land or with reference to any of the minerals deposited therein or thereunder, or any of the other natural products thereof;

5. That an accounting may be had by said defendants and each and every one of them, wherein said defendants, and each of them, shall make a full, complete, itemized and correct disclosure of the quantity of minerals (and particularly petroleum) removed or extracted or received by them or either or any of them, from said land, or any part thereof, and of any and all moneys or other property or thing of value received from the sale or disposition of any and all minerals extracted from said land or any part thereof, and of all rents and profits received under any sale, lease, transfer, conveyance, contract or agreement concerning said land or any part thereof; and that the plaintiff may recover from said defendants, respectively, all damages sustained by the plaintiff in these premises;

6. That a receiver may be appointed by this court to take possession of said land and of all wells, derricks, drills, pumps, storage vats, pipes, pipe lines, shops, houses, machinery, tools and appliances of

every character whatsoever thereon belonging to or in the possession of said defendants, or any of them, which have been used or now are being used in the extraction, storage, transportation, refining, sale, manufacture, or in any other manner in the production of petroleum or petroleum products or other minerals from said land or any part thereof for the purpose of continuing, and with full power and authority to continue the operations on said land in the production and sale of petroleum and other minerals, and for the preservation, [21] protection and use of the wells, derricks, pumps, tanks, storage vats, pipes, pipe lines, houses, shops, tools, machinery and appliances being used by the defendadnts, their officers, agents or assigns in the production, transportation, manufacture or sale of petroleum or other minerals from said land or any part thereof, and that such receiver may have the usual and general powers vested in receivers of courts of chancery;

7. That the plaintiff may have such other and further relief as in equity may seem just and proper.

To the end therefore that this plaintiff may obtain the relief to which it is justly entitled in the premises, may it please Your Honors to grant unto the plaintiff a writ or writs of subpoena, issued by and under the seal of this Honorable Court, directed to the said defendants herein, to wit: Consolidated Midway Oil Company, National Pacific Oil Company, Midnight Oil Company, Daybreak Oil Company, Panama Oil Company, France Wellman Oil Company, Standard Oil Company, Thirty Thirty-Two Land Company, General Petroleum Company, Mari-

copa Consolidated Oil Company, General Pipe Line Company of California, Title Insurance and Trust Company, Sesame Oil Company, Parker Barrett, Oma Barrett, Julius Fried, J. M. Dunn, L. E. Doan, George E. Whitaker, M. J. Laymance, Mary F. Francis, A. L. Weil, Florence G. Weil, J. M. Danzinger, Daisy C. Danziger, M. P. Waite, Anna W. Mary Waite, Charles A. Son, David S. Bachman and A. B. Coulson, therein and thereby commanding them and each of them at a certain time, and under a certain penalty therein to be named, to be and appear before this Honorable Court, and then and there severally, full, true and direct answers make to all and singular the premises, but not under oath, answer under oath being hereby expressly waived, and [22] stand to perform and abide by, such order, direction and decree as may be made against them, or any of them, in the premises and shall be meet and agreeable to equity.

GEORGE W. WICKERSHAM,
Attorney General of the United States.

A. I. McCORMICK,
United States Attorney.

B. D. TOWNSEND,
Special Assistant to the Attorney General.

United States of America,
Southern District of California,
County of Los Angeles,—ss.

Gratz W. Helm, being first duly sworn, deposes and says:

I am now, and have been for more than four years last past, an employee and agent of the General Land

Office, Department of the Interior of the United States; at all times from and after the 1st day of July, 1910, I have been, and am now, Chief of Field Division of the General Land Office of the United States, assigned to duty and in charge of the public lands of the said United States, comprised in the Sixth Field Division in the Southern District of California, including the land described in the foregoing bill of complaint. During all of said times hereinbefore mentioned, under such employment, I have been engaged in field examinations and other investigations on behalf of the Department of the Interior, with reference to the administration of the public land laws of the United States and the enforcement and protection of the proprietary and other rights of the United States pertaining to said public lands. The acts and transactions referred to in [23] the foregoing bill of complaint with reference to said land in paragraph II thereof described, were investigated by me, as such employee and agent, and under my supervision, direction and control, and in this manner I acquired knowledge thereof. The same are true of my own knowledge, except as to the statements therein made on information and belief, and as to those matters, I believe them to be true.

My knowledge of the facts upon which the prayer for temporary relief by injunction and receivership in said bill is based, was obtained from an inspection of the records of the United States Land Office for the Los Angeles Land District, the records of the office of the county recorder, County of Kern, California, and an inspection and observation of the land

described in said bill of complaint, and operations conducted in and upon said land, and upon admissions and statements made by certain of the defendants and their duly authorized officers and agents.

GRATZ W. HELM.

Subscribed and sworn to before me this 18th day of February, 1913.

[Seal] WM. M. VAN DYKE,
Clerk of U. S. District Court for the Southern District of California, Southern Division. [24]

[Motion to Dismiss Bill of Complaint.]

In the Distrit Court of the United States, Southern District of California, Northern Division, Ninth Circuit.

No. A-2—EQUITY.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

CONSOLIDATED MIDWAY OIL COMPANY,
NATIONAL PACIFIC OIL COMPANY,
et al.

Defendants.

To the Honorable, the District Court of the United States for the Southern District of California, Northern Division, Ninth Circuit:

Defendants, Consolidated Midway Oil Company, National Pacific Oil Company, Thirty Thirty-two Land Company, General Petroleum Company, General Pipe Line Company of California, Maricopa Con-

solidated Oil Co., A. L. Weil, Florence G. Weil, J. M. Danziger, Daisy C. Danziger, M. P. Waite, Anna W. Mary Waite, Charles A. Son, David S. Bachman, hereby move that the Bill of Complaint in the above-entitled action and the whole thereof be dismissed for insufficiency of fact to constitute a valid cause of action in equity against the defendants or any of them in this:

That it appears from the said Bill of Complaint that defendants entered into the actual occupation of the land described thereon on March 1st, 1910, under Mineral Locations theretofore made and made a discovery of oil thereon prior to July 2d, 1910, to wit, on June 29th, 1910, and that at the [25] time of the Order of Withdrawal of date July 2d, 1910, the land had been theretofore located and claimed under the Mineral Laws of the United States by defendants and their grantors, who, prior to that date, were in actual occupation and possession thereof, under laws, and had theretofore made a valid and subsisting discovery of petroleum in said land;

That the basis of plaintiff's cause of action depends on an alleged withdrawal of said land on the 27th day of September, 1909, by the President of the United States acting by and through the Secretary of the Interior, and that the alleged withdrawal of said land from entry on the 27th day of September, 1909, was unconstitutional, void and of no force and effect, and beyond the authority of the President and contrary to the provisions of Chapter 6, of Title 32 of the Revised Statutes of the United States and the Act of Congress of February 11, 1897, 27 Stat.

L. 526 and the acts amending and supplementing the same;

That it further appears that no withdrawal of the minerals in said land was ever made.

A. L. WEIL,

Solicitor for Defendants, Consolidated Midway Oil Company, National Pacific Oil Company, Thirty Thirty-two Land Company, General Petroleum Company, General Pipe Line Company of California, A. L. Weil, Florence G. Weil, J. M. Danziger, A. C. Danziger, M. P. Waite, Anna W. Mary Waite, Charles A. Son and David Bachman.

[Endorsed]: Original No. A-2—In Equity. U. S. District Court, Southern District of California, Northern Division, Ninth Circuit. The United States of America, Plaintiff, vs. Consolidated Midway Oil Company et al., Defendants. Motion to Dismiss by Consolidated Midway Oil Co. et al. Received a copy of the within Motion to Dismiss this 20th day of May, 1913. A. I. McCormick, U. S. Attorney. A. L. Weil, Attorney at Law, 1206 Alaska Commercial Building, San Francisco, Cal. Filed May 20, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [26]

In the District Court of the United States, Southern District of California, Northern Division, Ninth Circuit.

No. A-2—IN EQUITY.

THE UNITED STATES OF AMERICA,

Plaintiff,

versus

CONSOLIDATED MIDWAY OIL COMPANY,

National Pacific Oil Company, Midnight Oil Company, Daybreak Oil Company, Panama Oil Company, France Wellman Oil Company, Standard Oil Company, Thirty Thirty-Two Land Company, General Petroleum Company, Maricopa Consolidated Oil Company, General Pipe Line Company, of California, Title Insurance and Trust Company, Sesame Oil Company, Parker Barrett, Oma Barrett, Julius Fried, J. M. Dunn, L. E. Doan, George E. Whitaker, M. J. Laymance, Mary F. Francis, A. L. Weil, Florence G. Weil, J. M. Danziger, Daisy C. Danziger, M. P. Waite, Anna W. Mary Waite, Charles A. Son, David S. Bachman and A. B. Coulson,

Defendants.

Order Overruling Motions to Dismiss, and Appointing Receiver.

WHEREAS, motions to dismiss the bill of complaint in this suit were made by certain of the defendants herein, and were on January 3, 1914, and again on March 21, 1914, fully argued and submitted; and

WHEREAS, motions by the complainant for the appointment of a Receiver for the interests of the defendants Midnight Oil Company, Daybreak Oil Company, National Pacific Oil Company, [27] Consolidated Midway Oil Company, and A. L. Weil in the land described in the bill of complaint herein, together with all oil and other property on said land were on March 21, 1914, argued and submitted;

IT IS NOW CONSIDERED, ORDERED AND ADJUDGED that the motions of the defendants herein to dismiss are hereby overruled and denied, and each of the said defendants who made said motions to dismiss is allowed five days to file answer in addition to the time allowed by the New Equity Rules.

IT IS FURTHER ORDERED that A. E. Campbell, Esq., be, and he is hereby appointed Receiver of the property described in the bill of complaint herein claimed by the Midnight Oil Company, Daybreak Oil Company, National Pacific Oil Company, Consolidated Midway Oil Company, and A. L. Weil, to wit:

All of fractional Section Thirty, Township Twelve North, Range Twenty-three West, San Bernardino base and meridian, situated in Kern County, State of California, and of the oil, gas, and all other property of every kind M. T. D. situated on said land, or already extracted therefrom and still in the possession of defendants, and the defendants, and each of them, their agents, attorneys and employees are enjoined from removing said oil, gas, or other property or any part thereof from said land, or in any manner inter-

fering with the order of this Court, and are enjoined from further producing oil from said land, except by permission and under the direction of the said Receiver.

Said Receiver is directed to receive, and the said defendants are directed to surrender to said Receiver all moneys in their hands or in the hands of any person or corporation for them which are the proceeds of the sale of oil or gas produced [28] from said lands hereinbefore described, and the said Receiver is directed to collect any notes, accounts, or other evidences of debt due or payable on account of oil and gas produced from said land and sold by or for said defendants, or any of them.

The said Receiver is given power and directed to operate any oil or gas well or wells on said property, or to permit them to be operated by the respective defendants now in possession of or operating same, or who have heretofore operated on said lands; or to close said wells, if he deems it necessary or advisable to do so in order to conserve the oil and gas in said lands and prevent said property from being damaged or the oil and gas from being wasted.

The said Receiver is directed to ascertain the quantity of oil and gas heretofore extracted by said respective defendants, and to keep an accurate account of all oil and gas hereafter produced from said lands, and to sell said oil and gas for the best price obtainable.

For the purpose of making an investigation and determining the condition of the wells drilled on said lands, and particularly for the purpose of determin-

ing whether water is infiltrating the oil sands or reservoirs on said lands, and for the further purpose of ascertaining the amount of oil and gas heretofore produced, the price at which the same has been sold, and the value thereof, the Receiver is directed and empowered to examine the logs of the wells and the books of account kept by the defendants or any of them in the development and operation of said lands.

For the purpose of preventing damage to said lands by the infiltration of water into the oil sands and otherwise, and for the purpose of protecting and operating the said property, the said Receiver is authorized to employ such assistance and [29] incur such expense, to be paid out of the moneys coming into his hands as Receiver, as he shall deem necessary, subject to the approval of this Court. All moneys coming into the hands of said Receiver shall, unless otherwise directed by the Court, be deposited in a bank or banks to be selected jointly by the Receiver and the defendants who claim such moneys, or their respective solicitors of record, and the solicitor for the complainant, and such moneys shall be paid out by the said bank or banks only upon checks signed by said Receiver and by the said solicitors of record, or otherwise, as may be ordered by this Court.

A bond in the sum of Five Thousand (\$5,000) Dollars to be approved by this Court, shall be M. T. D. given by the Receiver within five days from the filing of this order; provided the solicitor for the complainant or for the defendants, or either of them, may at any time upon one day's notice to counsel for the opposite parties, apply to

the Court for an increase in the amount of said bond.

The amount of compensation to be paid to the Receiver in this suit is to be determined hereafter.

This April 23, 1915.

M. T. DOOLING,
United States District Judge.

[Endorsed]: No. A-2—Eq. U. S. District Court, Southern District of California. Northern Division. United States of America v. Consolidated Midway Oil Co, et al. Order Overruling Motions to Dismiss and Apptg. Receiver. Filed Apr. 26, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [30]

In the District Court of the United States, Southern District of California, Northern Division, Ninth Circuit.

No. A-2—IN EQUITY.

THE UNITED STATES OF AMERICA,

Plaintiff,

versus

CONSOLIDATED MIDWAY OIL COMPANY,
National Pacific Oil Company, Midnight Oil Company, Daybreak Oil Company, Panama Oil Company, France Wellman Oil Company, Standard Oil Company, Thirty Thirty-Two Land Company, General Petroleum Company, Maricopa Consolidated Oil Company, General Pipe Line Company of California, Title Insurance and Trust Company, Sesame Oil Company, Parker Barrett, Oma Barrett, Julius

Fried, J. M. Dunn, L. E. Doan, George E. Whitaker, M. J. Laymance, Mary F. Francis, A. L. Weil, Florence G. Weil, J. M. Danziger, Daisy C. Danziger, M. P. Waite, Anna W. Mary Waite, Charles A. Son, David S. Bachman and A. B. Coulson,

Defendants.

Petition for Order Allowing Appeal.

National Pacific Oil Company, a corporation, defendant herein, conceiving itself aggrieved by the Order given and rendered on the 23d day of April, 1915, and filed on the 26th day of April, 1915, in the above-entitled action, doth hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from that part of said order, a copy of which order is hereto annexed, which orders that:

“IT IS FURTHER ORDERED That A. E. Campbell, Esq., be [31] and he is hereby appointed Receiver of the property described in the bill of complaint herein claimed by the Midnight Oil Company, Daybreak Oil Company, National Pacific Oil Company, Consolidated Midway Oil Company, and A. L. Weil, to wit:

All of fractional Section Thirty, Township Twelve North, Range Twenty-three West, San Bernardino base and meridian, situated in Kern County, State of Colifornia,

and of the oil, gas, and all other property of every kind situated on said land or already extracted therefrom and still in the possession of defendants, and the defendants, and each of them, their agents, attorneys and employees are enjoined from removing

said oil, gas, or other property, or any part thereof from said land, or in any manner interfering with the order of this Court, and are enjoined from further producing oil from said land, except by permission and under the direction of the said Receiver.

Said Receiver is directed to receive, and the said defendants are directed to surrender to said Receiver all moneys in their hands or in the hands of any person or corporation for them which are the proceeds of the sale of oil or gas produced from said lands hereinbefore described; and the said Receiver is directed to collect any notes, accounts, or other evidences of debt due or payable on account of oil and gas produced from said land and sold by or for said defendants, or any of them.

The said Receiver is given power and directed to operate any oil or gas well or wells on said property, or to permit them to be operated by the respective defendants now in possession of or operating same, or who have heretofore operated on said lands; or to close said wells, if he deems it necessary [32] or advisable to do so in order to conserve the oil and gas in said lands and prevent said property from being damaged or the oil and gas from being wasted.

The said Receiver is directed to ascertain the quantity of oil and gas heretofore extracted by said respective defendants, and to keep an accurate account of all oil and gas hereafter produced from said lands, and to sell said oil and gas for the best price obtainable.

For the purpose of making an investigation and determining the condition of the wells drilled on said

lands, and particularly for the purpose of determining whether water is infiltrating the oil sands or reservoirs on said lands, and for the further purpose of ascertaining the amount of oil and gas heretofore produced, the price at which the same has been sold, and the value thereof, the Receiver is directed and empowered to examine the logs of the wells and the books of account kept by the defendants or any of them in the development and operation of said lands.

For the purpose of preventing damage to said lands by the infiltration of water into the oil sands and otherwise, and for the purpose of protecting and operating the said property, the said Receiver is authorized to employ such assistance and incur such expense, to be paid out of the moneys coming into his hands as Receiver, as he shall deem necessary, subject to the approval of this Court. All moneys coming into the hands of said Receiver shall, unless otherwise directed by the Court, be deposited in a bank or banks to be selected jointly by the Receiver and the defendants who claim such moneys, or their respective solicitors of record, and the solicitor for the complainant, and such moneys shall be paid out by the said bank or banks only upon checks signed by said Receiver [33] and by the said solicitors of record, or otherwise, as may be ordered by this Court.

A bond in the sum of Five Thousand (\$5,000) Dollars to be approved by this Court, shall be given by the Receiver within five days from the filing of this order; provided the solicitor for the complainant or for the defendants, or either of them, may at any

time upon one day's notice to counsel for the opposite parties, apply to the Court for an increase in the amount of said bond."

And defendant prays that this, its appeal, may be allowed; and that a transcript of the records and proceedings and papers upon which said order was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals.

Dated 20th May, 1915.

A. L. WEIL,

Solicitor for Defendant, National Pacific Oil Company.

[Endorsed]: No. A-2—In Equity. District Court of United States, Southern District of California, Northern Division, Ninth Circuit. The United States of America, Plaintiff, versus Consolidated Midway Oil Company et al., Defendants. Petition for Order Allowing Appeal. Filed May 21, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. A. L. Weil, Solicitor for Defendant, National Pacific Oil Company, Alaska Commercial Bldg., San Francisco, California. [34]

*In the District Court of the United States, Southern
District of California, Northern Division, Ninth
Circuit.*

No. A-2—IN EQUITY.

THE UNITED STATES OF AMERICA,

Plaintiff,

versus

CONSOLIDATED MIDWAY OIL COMPANY,
National Pacific Oil Company, Midnight Oil
Company, Daybreak Oil Company, Panama
Oil Company, France Wellman Oil Company,
Standard Oil Company, Thirty Thirty-Two
Land Company, General Petroleum Company,
Maricopa Consolidated Oil Company, General
Pipe Line Company, of California, Title In-
surance and Trust Company, Sesame Oil Com-
pany, Parker Barrett, Oma Barrett, Julius
Fried, J. M. Dunn, L. E. Doan, George E.
Whitaker, M. J. Laymance, Mary F. Francis,
A. L. Weil, Florence G. Weil, J. M. Danziger,
Daisy C. Danziger, M. P. Waite, Anna W.
Mary Waite, Charles A. Son, David S. Bach-
man and A. B. Coulson,

Defendants.

Assignment of Errors.

National Pacific Oil Company, a Corporation, de-
fendant and appellant herein, having appealed, or
being about to appeal, from that certain Order made
in the District Court of the United States, for the
Southern District of California, Northern Division,

Ninth Circuit, on the 23d day of April, 1915, and filed on the 26th day of April, 1915, in an action pending in said court in which The United States of America was plaintiff and the said National Pacific Oil Company, a corporation, and others were [35] defendants, by which said order a Receiver was appointed to take charge of the property of defendants, and each of them, says, that in the records and proceedings in the said court in the said action, there are manifest errors, and assigns the following as its assignment of errors upon the said appeal:

I.

That said District Court erred in making said order and appointing a Receiver.

II.

That said District Court, in making said order, erred in this, that said Court had not, nor had the Judge thereof, any jurisdiction to make the said order;

III.

That said District Court erred, in making said order, in this, that the said Court abused its discretion and permitted an abuse of discretion in making said order.

IV.

That said District Court erred, in making said order, in that the complaint of plaintiff in said action did not show facts justifying the appointment of a Receiver.

V.

That said District Court erred, in making said order, in that the complaint of plaintiff in the said

action fails to state any facts entitling the plaintiff herein to any equitable relief whatsoever.

VI.

That said District Court erred, in making said order, in authorizing and directing the receiver to take possession of the property mentioned in said order.

VII.

That said District Court erred, in making said order, in this, that defendant at that time and long prior thereto was in [36] the actual and peaceable possession of said property, claiming and holding the same under and by virtue of the laws of the United States, and that in and by the allegations of plaintiff's complaint herein, it appears that the plaintiff was and is out of possession. That it does not appear of record herein that an ancillary suit for the appointment of a Receiver had ever been commenced or brought by plaintiff against defendant. That plaintiff had and has a plain, speedy and adequate remedy at law, and said District Court, sitting as a Court of Equity herein, was and is without authority or jurisdiction to make said order.

In order that the foregoing assignment of errors may be and appear of record, the appellant above named presents the same to this Court, and prays that such disposition may be made thereof as by the law and the statutes of the United States in such case is made and provided.

A. L. WEIL,

Solicitor for Defendant and Appellant, National
Pacific Oil Company.

[Endorsed]: No. A-2—In Equity. District Court of United States, Southern District of California, Northern Division, Ninth Circuit. The United States of America, Plaintiff, versus Consolidated Midway Oil Company et al., Defendants. Assignment of Errors. Filed May 21, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. A. L. Weil, Solicitor for Defendant National Pacific Oil Company, Alaska Commercial Bldg., San Francisco, California. [37]

In the District Court of the United States, Southern District of California, Northern Division, Ninth Circuit.

No. A-2.—IN EQUITY.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

CONSOLIDATED MIDWAY OIL COMPANY,
National Pacific Oil Company, Midnight Oil Company, Daybreak Oil Company, Panama Oil Company, France Wellman Oil Company, Standard Oil Company Thirty Thirty-two Land Company, General Petroleum Company, Maricopa Consolidated Oil Company, General Pipe Line Company of California, Title Insurance and Trust Company, Sesame Oil Company, Parker Barrett, Oma Barrett, Julius Fried, J. M. Dunn, L. E. Doan, George E. Whitaker, M. J. Laymance, Mary F. Francis, A. L. Weil, Florence G. Weil, J. M.

Danziger, Daisy C. Danziger, M. P. Waite,
Anna W. Mary Waite, Charles A. Son, Davis S.
Bachman, and A. B. Coulson,

Defendants.

Order Allowing Appeal and Fixing Bond.

On motion of A. L. Weil, Esq., counsel for defendant, National Pacific Oil Company, a corporation, and on filing the petition of said defendant for an order allowing an appeal, together with an assignment of errors, IT IS ORDERED that an appeal be and is hereby allowed to the United States Circuit Court of Appeals, for the Ninth Circuit, from the order given and made herein on the 23d day of April, 1915, and filed on the 26th day of April, 1915, in the District Court of the United [38] States, for the Southern District of California, Northern Division, Ninth Circuit, appointing a receiver to take charge of the property of defendants, and each of them.

That the amount of the bond upon said appeal be and is hereby fixed at the sum of \$—— if the writ of supersedeas is desired.

That upon the execution and approval of said bond by this Court, a writ of supersedeas issue under the seal of this Court, directed to plaintiff herein, its agents and servants, and the Receiver appointed herein under said order, that they desist and refrain from, in any manner, interfering with said property, or in any manner enforcing or attempting to enforce said order of the 23d day of April, 1915, until said appeal be heard and determined, or the further order

of this Court. If a supersedeas is desired appellant may apply therefor to the Court of Appeals.

Dated 21 May, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: No. A-2—In Equity. District Court of United States, Southern District of California, Northern Division, Ninth Circuit. The United States of America, Plaintiff, versus Consolidated Midway Oil Company et al., Defendant. Order Allowing Appeal and Fixing Bond. Filed May 21, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. A. L. Weil, Solicitor for Defendant. National Pacific Oil Company, Alaska Commercial Bldg. San Francisco, California. [39]

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, That we, NATIONAL PACIFIC OIL COMPANY, as principal, and G. J. SYMINTON and R. E. MAYNARD, as sureties, are held and firmly bound unto THE UNITED STATES OF AMERICA in the full and just sum of FIVE HUNDRED DOLLARS, to be paid to the said THE UNITED STATES OF AMERICA, Its certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 21st day of

May in the year of our Lord One Thousand Nine Hundred and Fifteen.

WHEREAS, lately at a District Court of the United States for the Southern District of California, Northern Division, 9th Circuit, in a suit depending in said Court, between THE UNITED STATES OF AMERICA, Plaintiff, vs. CONSOLIDATED MIDWAY OIL COMPANY et al., Defendants, in which an order overruling motion to dismiss, and appointing a Receiver was rendered against the NATIONAL PACIFIC OIL COMPANY and the said NATIONAL PACIFIC OIL COMPANY having obtained from said Court an order allowing an appeal to reverse the said order in the aforesaid suit, and a citation directed to the said THE UNITED OF AMERICA citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said NATIONAL PACIFIC OIL COMPANY shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

NATIONAL PACIFIC OIL COMPANY. (Seal)

E. B. KIDSON, (Seal)

Secretary.

G. J. SYMINTON. (Seal)

R. E. MAYNARD. (Seal)

Acknowledged before me the day and year first
above written.

[Seal]

BERTHA L. MARTIN,

Notary Public in and for the County of Los Angeles,
State of California.

United States of America.

Northern District of California,—ss.

G. J. Syminton and R. E. Maynard being duly sworn, each for himself, deposes and says, that he is a freeholder in said District, and is worth the sum of FIVE HUNDRED DOLLARS, exclusive of property exempt from execution, and over and above all debts and liabilities.

G. J. SYMINTON.

R. E. MAYNARD.

Subscribed and sworn to before me, this 21st day
of May, A. D. 1915.

[Seal]

BERTHA L. MARTIN,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: No. A-2—In Equity. United States District Court for the Southern District of California, Northern Division, Ninth Circuit. The United States of America vs. Consolidated Midway Oil Company et al. Bond on Appeal of National Pacific Oil Company. Form of bond and sufficiency of sureties approved. M. T. Dooling, Judge. Filed Jun. 1, 1915. Wm. M. Van Dyke, Clerk. By Chas. H. Williams, Deputy Clerk. [41]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Northern Division.

No. A.-2—EQ.

Clerk's Office.

THE UNITED STATES OF AMERICA,

vs.

CONSOLIDATED MIDWAY OIL CO et al.

Praecipe for Transcript of Record on Appeal.

To the Clerk of Said Court:

Sir: Please issue Transcript of record on appeal of defendant, National Pacific Oil Company, in the above-entitled action, containing the following papers therein, viz:

1. Bill of Complaint;
2. Motion of Said Defendant to Dismiss Bill of Complaint;
3. Order Overruling Motion to Dismiss and Appointing Receiver;
4. Petition for Order Allowing Appeal, Omitting Therefrom Copy of Order Overruling Motion to Dismiss, etc., Attached Thereto;
5. Assignment of Errors;
6. Order Allowing Appeal, and Fixing Bond; and
7. Bond on Appeal.

A. L. WEIL,

Solicitor for National Pacific Oil Co.

[Endorsed]: No.A-2—Eq. U. S. District Court,
Southern District of California, Northern Division.

The United States vs. Consolidated Midway Oil Co. et al. Praeipie for Transcript of Record on Appeal. Filed August 31, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [42]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States, in and
for the Southern District of California, Northern
Division.*

No. A-2—EQUITY.

THE UNITED STATES OF AMERICA,

Plaintiff,

versus

CONSOLIDATED MIDWAY OIL COMPANY,
National Pacific Oil Company, Midnight Oil
Company, Daybreak Oil Company, Panama
Oil Company, France Wellman Oil Com-
pany, Standard Oil Company, Thirty Thirty-
two Land Company, General Petroleum
Company, Maricopa Consolidated Oil Com-
pany, General Pipe Line Company of Califor-
nia, Title Insurance and Trust Company,
Sesame Oil Company, Parker Barrett, Oma
Barrett, Julius Fried, J. M. Dunn, L. E.
Doan, George E. Whitaker, M. J. Lay-
mance, Mary F. Francis, A. L. Weil, Florence
G. Weil, J. M. Danziger, Daisy C. Danziger,
M. P. Waite, Anna W. Mary Waite, Charles
A. Son, Davis S. Bachman, and A. B. Coulson,
Defendants.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing forty-two (42) typewritten pages, numbered from 1 to 42, inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the Bill of Complaint, Motion to Dismiss Bill of Complaint, Order Overruling Motion to Dismiss and Appointing Receiver, Petition for Order Allowing Appeal, Assignment of Errors, Order Allowing Appeal and Fixing Bond, Bond, on Appeal and Praecipe [43] for Transcript in the above and therein entitled cause, and that the same together constitute the record in said cause, as specified in the said Praecipe filed in my office by the defendant and appellant, National Pacific Oil Company, by its attorney of record.

I do further certify that the cost of the foregoing record is \$23.15, the amount whereof has been paid me by the National Pacific Oil Company, the appellant in said cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Northern Division, this 8th day of September in the year of our Lord

one thousand nine hundred and fifteen, and of our Independence the one hundred and fortieth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By Leslie S. Colyer,

Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled
9/8/15. L. S. C.] [44]

[Endorsed]: No. 2656. United States Circuit Court of Appeals for the Ninth Circuit, National Pacific Oil Company, a Corporation, Appellant, vs. The United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Northern Division.

Filed September 21, 1915.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

[Order Allowing Appellant to and Including August 19, 1915, to File Transcript on Appeal.]

In the District Court of the United States, Southern District of California, Northern Division, Ninth Circuit.

No. A-2—IN EQUITY.

UNITED STATES OF AMERICA,

Plaintiff and Respondent,

vs.

CONSOLIDATED MIDWAY OIL COMPANY
et al.,

Defendants and Appellants.

Good cause being shown therefor,

IT IS HEREBY ORDERED that the appellant National Pacific Oil Company have sixty (60) days additional and further time from the 20th day of June, 1915, within which to file its transcript on appeal in the above-entitled suit with the Clerk of the United States Circuit Court of appeals in and for the Ninth Circuit.

Dated June 16, 1915.

M. T. DOOLING,

Judge of the District Court.

[Endorsed]: No. A-2—In Equity. U. S. District Court, Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff and Respondent, vs. Consolidated Midway Oil Company et al., Defendants and Appellants. Order Extending Time to File Transcript on Appeal.

Filed Jun. 17, 1915. Wm. M. Van Dyke, Clerk.
By Chas. N. Williams, Deputy Clerk.

No. 2656. United States Circuit Court of Appeals
for the Ninth Circuit. Order Under Rule 16 Enlarg-
ing Time to Aug. 19, 1915 to File Record Thereof and
to Docket Case. Filed Sep. 7, 1915. F. D. Monckton,
Clerk. Refiled Sep. 21, 1915. F. D. Monckton,
Clerk.

**[Order Allowing Appellant to and Including October
18, 1915, to File Transcript on Appeal.]**

*In the District Court of the United States, Southern
District of California, Northern Division, Ninth
Circuit.*

No. A-2—IN EQUITY.

UNITED STATES OF AMERICA,

Plaintiff and Respondent,

vs.

CONSOLIDATED MIDWAY OIL COMPANY
et al.,

Defendants and Appellants.

Good cause being shown therefor,

IT IS HEREBY ORDERED that the appellant
National Pacific Oil Company have sixty (60) days
further time in addition to the time heretofore al-
lowed, within which to file its transcript on appeal in
the above-entitled suit with the Clerk of the United

States Circuit Court of Appeals in and for the Ninth Circuit.

Dated August 16, 1915.

ROSS,
Circuit Judge.

[Endorsed]: No. 2656. United States Circuit Court of Appeals, for the Ninth Circuit. United States of America vs. Consolidated Midway Oil Company et al. Order Extending Time to File Record. Filed Sep. 7, 1915. F. D. Monckton, Clerk. Refiled Sep. 21, 1915. F. D. Monckton, Clerk.]

